Nos. 17-1717, 18-18

In The Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents,

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

This Court has been undivided in understanding the Establishment Clause to prohibit the government from aligning itself with a single religion. The Latin cross is the preeminent symbol of Christianity and Christianity alone. No other faith uses the Latin cross as a symbol of death or sacrifice. The question presented is this:

Does the Establishment Clause allow the government to permanently and prominently commemorate Christian veterans—and only Christian veterans—by funding, maintaining, using, and displaying a massive concrete Latin cross in the center of a heavily-trafficked intersection at the entrance of town?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ix
STATEMENT OF THE CASE	1
A. Factual Background	1
1. The origins of Bladensburg's Latin Cross	1
2. The historical context in which the Bladensburg Cross was erected	5
3. The Cross's physical features and setting	8
4. The Commission's ownership of the Cross	11
5. The Commission's 1985 Renovation and Rededication of the Cross to all veterans and Town-sponsored events with Christian clergy	12
6. 2008-present: A crumbling "eyesore" and safety hazard	14
7. The Latin cross and its exclusively Christian meaning	16
B. Procedural History	17
SUMMARY OF ARGUMENT	19
ARGUMENT	26

TABLE OF CONTENTS – Continued

Page

I. The Bladensburg Cross violates fundamental Establishment Clause principles irrespective of the *Lemon* test 26

A. The central principle of the Establishment Clause is that the government cannot align itself with any one religion 27

1. The government violates the central command of the Establishment Clause when it places its imprimatur upon a potently sectarian symbol such as the Latin cross 30

2. The Latin cross is not a secular symbol that represents Islam, Judaism, Atheism, and Christianity alike 34

B. Using a Latin cross as a war memorial does not make the cross secular; it makes the war memorial Christian 37

1. Neither the Latin cross generally, nor this Cross in particular, commemorates, honors, or respects non-Christian veterans 37

2. The Latin cross is not a universal secular World War I symbol and, even if it were, that's not why it was chosen here 42

TABLE OF CONTENTS – Continued

Page

i. In World War I cemeteries, a cross marks a *Christian soldier's* grave and a Star of David marks a *Jewish soldier's* grave 42

ii. The Bladensburg Cross does not evoke a World War I headstone nor was it intended to 47

3. Allowing the government to redefine the meaning of the Latin cross as a "secular" and "benign" symbol of all "the fallen"—to represent the sacrifices of Atheists and Muslims alike—would degrade religion in the very ways the Founders feared 49

C. Far from undercutting the government's imprimatur, the Cross's context only aggrandizes it 53

1. The Cross was erected with the Town's blessing and has been owned, funded, used, promoted, and prominently displayed by the government for decades 54

2. The Cross is a permanent, not ephemeral, monument 56

3. The Cross is the Town's most prominent monument 57

4. The Cross dominates its surroundings and is not integrated into a larger display 58

TABLE OF CONTENTS – Continued

Page

5. The nature of the property on which this Cross stands makes the government's imprimatur unambiguous 61

6. The longevity of this Cross has intensified its exclusionary sectarian meaning 63

II. The "history" and "coercion" tests advocated by Petitioners and their *amici* have little to commend themselves and, in any event, would not change the outcome here 66

A. The "history" test is unworkable and unprincipled, has been repeatedly rejected by this Court, and is in any event met here 67

1. *Town of Greece* did not modify the legal standard for legislative-prayer, let alone for Establishment Clause jurisprudence generally 67

2. This Court has never held—and indeed has disavowed—that a practice is authorized under the Establishment Clause simply because it has a strong historical pedigree 69

3. Even if *Town of Greece* were applicable here, it would not call for a reversal 72

TABLE OF CONTENTS – Continued

Page

i. This imposing 40-foot Cross is not an internal practice to accommodate the spiritual needs of lawmakers 72

ii. The Bladensburg Cross is not ecumenical..... 72

iii. There is no long, unbroken, and unambiguous history accepted by our Framers of conspicuously displaying massive solitary Latin crosses or using the Latin cross as a non-Christian military symbol 73

4. The "history" test is neither a workable nor principled approach to religious-display cases. 78

B. Holding that the Establishment Clause does nothing more than preclude religious coercion would write the Establishment Clause out of the Constitution and overturn seventy years of precedent 81

1. This Court has consistently rejected the argument that coercion is a necessary requirement for an Establishment Clause violation 81

2. The coercion-only standard is unworkable, unprincipled, and akin to no test at all in the context of religious displays 82

TABLE OF CONTENTS – Continued

Page

3. The Cross fails the coercion test 87

III. If the Court reaches the question, it should reaffirm the *Lemon* test and hold that the Bladensburg Cross runs afoul of the test 89

A. The *Lemon* test derived from decades of precedent, effectuates the principles of the Establishment Clause, and has brought clarity and consistency to religious-display cases 89

B. The Cross is unconstitutional under *Lemon* 92

IV. Upholding the Fourth Circuit's decision will not have the calamitous consequences Petitioners and their *amici* forecast 93

A. Declaring the Bladensburg Cross unconstitutional would not doom other war memorials 93

1. Petitioners overexaggerate the ubiquity of freestanding Latin cross memorials 93

2. The Bladensburg Cross is materially distinguishable from crosses in cemeteries and other multi-faith complexes 96

TABLE OF CONTENTS – Continued

Page

B. Affirming the Fourth Circuit's ruling would not portend the "mutilation" of the Cross; nor would reversing save the Cross from its own demise 99

CONCLUSION 100

TABLE OF AUTHORITIES

Page

CASES

ACLU v. Schundler, 168 F.3d 92 (3d Cir. 1999) 98

ACLU v. Rabun Cnty. Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983).....35

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Board of Education v. Mergens, 496 U.S. 226 (1990).....81

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Braunfeld v. Brown, 366 U.S. 599 (1961).....90

Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) 40, 41

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TABLE OF AUTHORITIES – Continued

Page

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Dickerson v. United States, 530 U.S. 428 (2000) 26

Edwards v. Aguillard, 482 U.S. 578 (1987) ... 68, 81, 84, 91

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 29

Ellis v. La Mesa, 990 F.2d 1518 (9th Cir. 1993) 41

Engel v. Vitale, 10 N.Y.2d 174 (1961) 70

Engel v. Vitale, 370 U.S. 421 (1962) ..... *passim*

Epperson v. Arkansas, 393 U.S. 97 (1968) 28, 82, 83

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Friedman v. Bd. of Cnty. Comm'rs, 781 F.2d 777 (10th Cir. 1985) 38, 57

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TABLE OF AUTHORITIES – Continued

Page

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Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) 40, 56

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Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988) 36, 41, 47

King v. Burwell, 135 S. Ct. 2480 (2015) 67

Kondrat'yev v. City of Pensacola, 2017 U.S. Dist. LEXIS 203588 (N.D. Fla. June 19, 2017) 41

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 68, 83

Larson v. Valente, 456 U.S. 228 (1982) 26, 28, 90

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McDonald v. City of Chi., 561 U.S. 742 (2010) 80

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Meek v. Pittenger, 421 U.S. 349 (1975) 89

TABLE OF AUTHORITIES – Continued

Page

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Pitts v. City of Kankakee, 267 F.3d 592 (7th Cir. 2001) 64

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Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995) 35

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Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 50

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Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006) 98

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Stone v. Graham, 449 U.S. 39 (1980) 56, 91

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 70, 82

Torcaso v. Watkins, 367 U.S. 488 (1961) 70, 90

Town of Greece v. Galloway, 572 U.S. 565 (2014) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

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Wallace v. Jaffree, 472 U.S. 38 (1985) 29, 81

Walz v. Tax Commission, 397 U.S. 664 (1970) 69, 70, 83, 85

Welsh v. United States, 398 U.S. 333 (1970) 82

Zorach v. Clauson, 343 U.S. 306 (1952) 28, 50, 51, 74

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

STATUTES

Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 604, 126 Stat. 1165 (2012) 97

REGULATIONS

23 CFR § 710.403(a) 58

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT OF THE CASE

A. Factual Background

The government is prominently displaying a 40-foot-tall concrete Latin cross—symbolic of "Calvary, as described in the Bible"—at the entrance to the Town of Bladensburg in the center of one of the busiest intersections in Prince George's County, Maryland (the "Bladensburg Cross" or the "Cross.") Pet.App.6a-7a, 54a, 59a[1]; J.A.279, 984, 1410. The Cross and the median are owned and maintained exclusively by the Maryland National Capital Park and Planning Commission ("Commission"), a bi-county agency funded by Prince George's County and Montgomery County. Pet.App.55a; J.A.70, 290, 299.

1. The origins of Bladensburg's Latin Cross

In January of 1919, residents of Prince George's County chose a secular doughboy as the symbol to commemorate those who perished in World War I. J.A.60-61, 110-13, 462. The memorial was unveiled in 1919 at the county courthouse, bearing the same names as those that would later appear on the Bladensburg Cross. J.A.112, 145, 462.

Later that same year, apparently dissatisfied with this secular memorial, the Good Roads League obtained the consent of the Commissioners of the Town

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[1] "Pet.App." refers to the Commission's Petition Appendix.

of Bladensburg (the "Town") to erect a large "Calvary Cross" on Town property. Pet.App.6a-8a, 55a-58a.

The plan was to erect a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible." Pet.App.7a; J.A.428. "Calvary" refers to the "proper name of the place where [Jesus] Christ was crucified." Pet.App.7a; J.A.135. The committee overseeing the effort was aptly named the "Calvary Cross Memorial" committee. J.A.431.

John Earley, who had recently designed a critically acclaimed Catholic shrine, was chosen as the Cross's designer. J.A.309-10, 1348-50, 1545-47. The Committee then proceeded to fundraise for the edifice (J.A.428, 431) asking donors to sign a pledge stating that they "trust[ed] in God, the Supreme Ruler of the universe," and pledged to "'one god, one country and one flag.'" Pet.App.55a-56a; J.A.43, 1252.

The Town "soon picked the perfect spot for their memorial, the former Bladensburg Port landing—the center of the town's economic and social life for much of the nineteenth century." Maryland Elected Officials and Prince George's County Amicus Br.13. "Town leaders chose to locate the monument on a prominent piece of land in what was then the center of town" (*id.* at 6), as the land was then "owned by the Town." Pet.App.7a, 56a-57a; J.A.64.

At the groundbreaking ceremony, held on September 28, 1919, the Secretary of the Navy "was the primary speaker" and other "'speeches were given by

local officials.'" Pet.App.56a-57a; J.A.1260, 910, 1024-26.

By 1922, the Calvary Cross was erected in its cruciform but unfinished. J.A.177, 1027, 1056, 1061-62. C.A.App.1208. The committee failed to raise enough funds and thus abandoned their efforts. Pet.App.57a; J.A.462. This was "attributed to the keen competition" the Cross faced with the secular memorial slated for, and then erected at, the courthouse—which yielded a "far more successful" fundraising campaign. J.A.462. "[M]any citizens, aware the county already had a war memorial, deemed unnecessary to support further attempts to complete the Peace Cross." *Id.*

Due to its prominent placement on the main Washington-Baltimore thoroughfare, the unfinished Cross "became an eye-sore to those who passed everyday." J.A.462. So on February 25, 1922, the Town "resolved" to convey to the American Legion ("Legion") Post 3 the "care" of the land on which "the cross now stands" for the "completion" of the Cross. Pet.App.57a-58a; J.A.64-65, 463. The land, "together with the Cross and its surroundings," would revert to the Town if Post 3 disbanded. Pet.App.58a; J.A.65.

The Legion's first fundraising drive for the Cross in April 1922 featured Christian prayers. Pet.App.4a; J.A.1058-59. In May 1922, the Legion held memorial services at the site, where a Christian chaplain led prayer and those in attendance sang the Christian hymn, "Nearer My God to Thee." Pet.App.7a; J.A.1061-62.

The Cross was dedicated on July 12, 1925, at a public ceremony led by government officials and Christian clergy. Pet.App.58a-59a; J.A.216-18. The keynote speaker, Maryland Representative Stephen Gambrill, reaffirmed this Cross's distinctly Christian meaning, declaring: "by the token of this cross, *symbolic of Calvary*, let us keep fresh the memory of our boys who died for a righteous cause." Pet.App.59a; J.A.216-18 (emphasis added).

A Roman Catholic priest and a Baptist minister delivered Christian prayers. Pet.App.7a; J.A.217-18. Other "local officials and figures delivered remarks." Pet.App.59a. "No rabbi or Jewish leader took part in the dedication of the [Bladensburg] Cross despite the close proximity" to "substantial Jewish communities." J.A.118-19.

Immediately after its dedication, the Cross became the site for "rites," "exercises," "services" and "marches," many of which included prayers. Pet.App.8a, 23a, 62a; J.A.179, 471-88. On July 26, 1925, robed Klansmen marched from "the peace cross at Bladensburg to the fiery cross at Lanham." J.A.505-06. In May 1928, "exercises at the foot of the Memorial Cross" included prayers by Rev. Carey of St. Jerome's Catholic Church and Rev. Robertson of the First Baptist Church. J.A.471. In May 1929, memorial "exercises" at the Cross included prayers delivered by the Rector of St. Luke's Episcopal Parish. J.A.1407-08. Frank Mountford, lauded as a leading evangelist, held three "Sunday services" at the Cross in August 1931. Pet.App.8a, 40a, 62a; J.A.179.

2. The historical context in which the Bladensburg Cross was erected

As expert witness Dr. Kurt Piehler testified, for "most Jews, especially observant Jews, it would be surprising if they did not view the Bladensburg Peace Cross as an overtly hostile Christian symbol." J.A.121.

When the Cross was erected in 1925, it was a crime in Maryland "to blaspheme or curse God or write or utter profane words about our Saviour Jesus Christ or of or concerning the Trinity or any of the persons thereof." Benjamin H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L.J. 659, 676-77 (1930). This law was enforced *until 1970*. *State v. West*, 9 Md. App. 270, 272-73 (1970).

Likewise, until this Court intervened in 1961, Maryland's test oath barred from office all "[c]itizens unwilling to avow a belief in Christianity, or being Jews, were unwilling to subscribe to a belief in a hereafter." Benjamin H. Hartogensis, *Unequal Religious Rights In Maryland Since 1776*, 25 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 93, 98-99 (1917), https://www.jstor.org/stable/43058054. Thus, until 1961 "Jews, unwilling to submit or subscribe to the test, deists (like Thomas Jefferson), atheists, Pantheists, Moslems, Buddhists, and Brahmins" were excluded from office. *Id.* Pet.App.23a-24a.

Throughout the First World War, the Latin cross "reflected a strain of exclusion directed against a small, but growing Jewish population." J.A.1098. *See*

J.A.1329-33. As a former commander wrote, Jewish war veterans united to fight a "tidal-wave" of "poisonous propaganda of passion and prejudice, of Religious bigotry, intolerance, and race hatred." J.A.1329. "The most baseless anti-Semitic utterances portrayed Jews" as "money lovers who would never risk life and limb for country." J.A.1329.

"GENTILES ONLY" would be the sign Jews confronted at popular vacation spots near Annapolis. Jewish Washington, *Restrictions, Scrapbook Of An American Community*, https://bit.ly/2SVkN85 (accessed Jan. 14, 2019). Builders used restrictive covenants to dissuade Jews from buying property in Spring Valley and parts of Chevy Chase. *Id. See also* Emanuel Milton Altfeld, *The Jewish Struggle for Religious and Civil Liberty in Maryland* (1924), https://bit.ly/2DnlQs8.

In Prince George's County in the 1920s, the Latin cross was "appropriated by the Ku Klux Klan as a sectarian symbol designed to intimidate Jews, Roman Catholics, and African Americans." J.A.80. *See* J.A.117-22, 495-523.

In 1924, 400 robed Klansmen conducted a full "Ku Klux Klan" funeral less than a mile away from the nearly-finished Cross and "200 persons other than Klansmen stayed for the ceremonies." J.A.495-96. In 1925, Klansmen marched from "the peace cross at Bladensburg to the fiery cross at Lanham." J.A.506, 118. That same year, 100,000 robed Klansmen marched through Washington, D.C. J.A.119. Cross burnings were common in nearby Mt. Rainier. *Id. See*

also Virginia v. Black, 538 U.S. 343, 393 (2003) (Thomas, J., dissenting) (discussing rise in cross burnings in Virginia in 1920s); M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* at 21, 382 (1991) ("Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence.").

"A number of Klansmen were members of the American Legion during this era." J.A.120. In some "communities, the Klan and Legion memberships were one in the same." J.A.1334-35.

The Legion put on "the greatest ministrel [sic] show ever held in Hyattsville" to benefit "the Memorial Cross." C.A.App.2088. The Legion also fundraised with carnival games like "Coon in Barrel" and "Japanese Board." C.A.App.2075. *See also* J.A.1059.

"During World War I, attempts to use religious iconography were seen as highly controversial." J.A.99. The Jewish Welfare Board protested the use of the Latin cross on overseas chapels, the Tomb of the Unknown Soldier, as the symbol on chaplain uniforms (including for Rabbis), and most importantly, as the symbol over Jewish graves. J.A.106-13, 160-67, 324-25, 1129-30, 1163-1241. *See* J.A.1143-44 (such attempts to use the cross "showed a lack of sensitivity to non-Christian Americans who also had made the highest sacrifice").

Their pleas met with some success. In overseas cemeteries, the government agreed to put Stars of David over Jewish graves. J.A.109. The Legion (at 4)

quotes Dr. Piehler's statement that "'the Cross became the principal grave marker' during WWI," but omits the rest of the sentence: "*with a Star of David gravestone used for Jewish soldiers.*" J.A.1094 (emphasis added). *Accord* Comm'n Br.4 (quoting J.A.1143). Cemeteries in the United States adopted the uniform slab marker. Pet.App.35a; J.A.80, 160. And the "vast majority of World War I memorials do not make use of religious iconography in their design." J.A.98. The "free standing Latin Cross in Bladensburg is distinctive." J.A.110. The "most widely used World War I monument erected in most communities was the doughboy statue." J.A.165; *see* J.A.110-16.

3. The Cross's physical features and setting

The Bladensburg Cross is an "imposing 40-foot, 16-ton" (J.A.1420) concrete Latin cross. Pet.App.7a, 54a; J.A.737, 746, 750, 918, 984. The Cross is the Town's "most prominent symbol." J.A.868. *See* J.A.44-47. A councilwoman boasted in 2001: "The [Cross] has always denoted Bladensburg." J.A.868.

The Cross towers over a small traffic island that serves as a median between three major commercial/commuter roadways—"a strategic position at the point where the Washington-Baltimore Boulevard joins the Defense Highway leading from Washington to Annapolis." Pet.App.56a; *see* J.A.33-34, 44, 306; C.A.App.686. It is "one of the county's busiest intersections"

(Pet.App.6a; J.A.279), traversed by "thousands" of motorists on a daily basis. J.A.1013.

The Cross is the only monument on the island. Pet.App.8a-10a; J.A.40, 44, 53, 423-26. There are no other religious symbols in sight. Pet.App.9a-10a, 29a, 46a. The Cross itself has no secular features aside from a small "U.S." star in the center. Pet.App.93a-94a; J.A.42, 765. Petitioners assert this is the "American Legion" symbol (Comm'n Br.21; Legion Br.60), yet the Commission's records refer to it as a generic "gold star bearing the letters 'U.S.' in red in the center." J.A.62-63, *accord* J.A.171, 209, 969, 973, 1505. The Legion is not named anywhere on the Cross or its base. Pet.App.32a-34a, 55a; J.A.1504-05.

There "are no specific pedestrian rights-of-way" to the median and no designated parking. Pet.App.25a; J.A.44, 70, 279, 1348, 1484; J.A.460 ("No public access is possible.").

Affixed to one side of the Cross's base is a 2-foot-tall plaque listing men who died in World War I. Pet.App.8a-9a, 55a.[2] The plaque is usually obscured by bushes. Pet.App.9a, 26a; J.A.41, 236, 423-24, 701, 929-31, 984; C.A.App.861; 1102, 1107, 1112. Even when cleared, the plaque cannot be read by passing motorists. Pet.App.9a, 25a; C.A.App.1463, 1104, 1112;

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[2] Not everyone named on the Cross was from Prince George's County. The plaque includes several men from Baltimore, D.C., and Virginia. J.A.467-68, 1565.

J.A.426, 887-90. One local didn't even know her uncle's name was on the plaque until this litigation.[3]

The Cross stood as the only monument in the area for over 20 years. J.A.992-94, 1004-07. In the 1940s, the government approved the placement of a World War II scroll—approximately one-third the Cross's size—in a separate area across the highway. J.A.1004, 44, 47. This was the only other monument in the area for 40 years, until the even smaller (6-foot-tall) Korea-Vietnam memorial was erected near the scroll in 1983. J.A.1006-07, 1529, 44, 46. It would be another twenty years until the fourth memorial (for 9/11) was added (by the county) to the separate parcel with the scroll, but it is a walkway, not a monument. J.A.44-45. After litigation commenced, in 2014, the government installed a War of 1812 monument about half a mile away from the Cross and about one-half the Cross's size. Pet.App.9a-10a; C.A.App.707-08, 2024. And recently, the Commission installed two soldier cut-outs (approximately 5-feet-tall) situated atop poles, but only one is visible from the Cross and it is on the separate parcel with the scroll. Pet.App.61a; J.A.856-57.[4]

A 2015 Commission report conceded that the Cross is the "centerpiece" and is "clearly towering over the space." J.A.1348.

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[3] Ann E. Marimow and Michael E. Ruane, *A World War I cross under siege*, Washington Post (Sept. 21, 2018), https://wapo.st/2U2UvRo.

[4] *Google Maps*, https://goo.gl/maps/QXupqkdCYGy, https://goo.gl/maps/cRroAB86QW72 [https://bit.ly/2R4h3zm] (accessed Jan. 14, 2019).

4. The Commission's ownership of the Cross

Petitioners mislead the Court when they claim that the Commission owns the "Cross only because of roadway expansion and traffic safety concerns." Comm'n Br.13, *accord* 55; Legion Br.16. The Town deliberately chose to showcase the Cross by approving its erection on prominent Town-owned property. Pet.App.7a, 56a-57a. While Petitioners claim that the Cross just "ended up in the median of a traffic roundabout" (Legion Br.8), a 1919 *Washington Times* article confirms that it was the Town's intent to have the Cross placed in a median: "The cross will be erected at the intersection of the Washington and Baltimore boulevard and the new National Defense Highway, now being constructed on the way to Annapolis. This triangle park, [] is an admirable site." C.A.App.1128. *See* J.A.1347.

The Cross stood unfinished, but in cruciform (J.A.177), before the Town deeded it to the Legion for its "perpetual care" in 1922. J.A.65. Before the Post would disband, in 1935, the governor asked the State Roads Commission to "prevent the 'desecration' of the Memorial Cross at Bladensburg by proposed erection of a service station on the property." J.A.491. A senator suggested that condemning the property would prevent such "'desecration.'" *Id.*

And in 1960, the Commission acquired the Cross from the Roads Commission for the purposes of "the future repair and maintenance of the monument." J.A.1535. Thus, the Commission owns the land not *in*

spite of the Cross, but *because of* it. It is unclear if the *Cross's parcel* was ever needed by the Roads Commission. *See* J.A.1033. But it is clear that when the Commission acquired the Cross, it was not for traffic and safety concerns. Furthermore, any claim that the Commission's interest is limited to ensuring the public's safety cannot be squared with the Commission's choice to "rededicate" the Cross as a government war memorial, *infra*.

5. The Commission's 1985 Renovation and Rededication of the Cross to all veterans and Town-sponsored events with Christian clergy

In 1985, the Commission spent $100,000 of county taxpayer funds to renovate the Cross. Pet.App.8a, 63a; J.A.191-92, 427; C.A.App.2484.

After the renovation, on November 11, 1985, the Commission, together with the Town, held an elaborate "Rededication" ceremony to rededicate the Cross to "all veterans." Pet.App.62a; J.A.68-69, 191-202, 222-25.

The Commission invited Father Chimiak of St. Matthias Catholic Church to deliver the prayers at the ceremony and later thanked him "for his contributions to our programs" asserting that it "trust[ed] we may assimilate this relationship again." J.A.195. *See also* J.A.1392. Over 400 attended the rededication. J.A.195.

Since 1960, the Town has embraced the Cross as its own (it was, after all, the Town's to begin with). J.A.1425; Pet.App.7a-8a, 61a-61a; *see* J.A.68, 182-202, 222-73, 525-608.

In addition to co-sponsoring the rededication, on July 12, 1975, the Town participated in the Cross's "50th Anniversary." J.A.526-34. The Rector of St. Luke's Episcopal Church delivered the opening prayer and the featured speaker was a Christian chaplain, who delivered the closing prayer. J.A.533-34, 1033.

On July 4, 1984, the Town hosted an "Independence Day" ceremony featuring two prayers by Father Chimiak. J.A.187-90. The Town continued to host similar July celebrations throughout the 1980s and 1990s. J.A.182-86, 225-29.

The Town also co-sponsors annual veterans services at the Cross with the Legion and those services regularly include prayers by lay and ordained Christians. Pet.App.7a-8a, 23a, 61a-62a; J.A.230-73, 1043, 539-608. "Nothing in the record indicates that any of these services represented any faith other than Christianity." Pet.App.8a.

Moreover, every ceremony held *for the Cross*—its fundraising drive, dedication, "50th anniversary," and rededication—included prayers by Christians. Pet.App.7a-8a, 23a, 59a; J.A.195-202, 471-88, 1033, 1413-16, 1059-62.

6. 2008-present: A crumbling "eyesore" and safety hazard

For the first 15 years of the Commission's ownership, the Cross was a low priority. A 1984 article reported that this "imposing 40-foot, 16-ton monument" was "deteriorating," "neglect[ed]," falling apart, and posing a hazard to "children and adults." J.A.1420-21. *See* J.A.730-35.

After the 1985 $100,000 renovation, the Commission spent $17,000 on routine maintenance. Pet.App.8a, 30a, 63a; J.A.69. But the commercial and traffic pollutants and a "complex array of [other] variable stresses" rendered these efforts futile. J.A.737-38, 750-52. In 2008, the Commission set aside $100,000 for another substantial renovation project because the Cross was "rapidly deteriorating" with large chunks falling off. Pet.App.8a, 30a, 63a; J.A.290-93, 850-53.

In 2009, the Commission reported: "There are two cracks that are getting worse which potentially will cause a face of the [Bladensburg] Cross to fall off." J.A.832.

A 2010 Commission report referred to the Cross as a "public eyesore." J.A.729. The report warned that repairs could easily "fail" and even "accelerate damage to the monument." J.A.752. In 2010, the Commission sought Requests for Proposals, but none were within budget so it cancelled the project. J.A.766, 820-32, 851, 861, 311.

When the Commission received Respondents' cease-and-desist letter in 2012, it didn't hesitate to "delay[] the restoration project." *See* J.A.843-44 ("I guess now that I don't have anything big on my plate I can vacation in Bora Bora. . . . . .").

In 2012, a Commission official proclaimed: "Wow. Looks like another big chunk fell off it, so it may come down on its own!!" J.A.841.

In November 2013, another official mused: "At what point does one stop making repairs, and consider whether it *makes more sense to start from scratch* or not . . .?" J.A.847 (emphasis added). The Commission's designee testified in March 2015: "As a matter of fact, the Peace Cross is coming down now." J.A.1074.

These internal conversations starkly contrast with the Commission's public statement that the Fourth Circuit's "decision will necessitate an act of shocking disrespect." Comm'n Pet.33.

The Commission was in no hurry to recognize the Cross's supposed "historic significance" either. Comm'n Br.43 (noting that the Commission did not give the Cross local historic preservation status until 2010). *See also* J.A.865 (disinterest in nominating Cross for state preservation funding in 2012). The idea to have the Cross listed in the National Register of Historic Places was the brainchild of a private citizen. C.A.App.3421. And she proposed it only because she thought this honorific listing would thwart this litigation. C.A.App.2124-25, 3421.

7. The Latin cross and its exclusively Christian meaning

No "symbol [is] more closely associated with a religion than the cross is with Christianity." Douglas Keister, *Stories in Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004). The Latin cross has been the preeminent symbol of Christianity for almost 2,000 years. Pet.App.21a, 89a-90a; J.A.81.[5]

The Latin cross is not embraced by non-Christians or used by them as a symbol of death or sacrifice. Pet.App.20a-21a, 35a; J.A.82. Some faiths even view it as a symbol of their religious oppression. *See* Giles Fraser, *Christians must understand that for Jews the cross is a symbol of oppression*, The Guardian (2014), https://bit.ly/2LP63DN; National Park Service, *LATIN CROSS—Christian Faith*, https://bit.ly/2Hnyxrc (accessed Jan. 14, 2019) ("Indigenous African religions were stifled by the nineteenth century due to the religious oppression by the white Christian slave owners"); Meagan Flynn, *To Catholics, Junípero Serra is a saint. To Stanford University, he's a mailing address worth eliminating*, The Washington Post (Sept. 18, 2018), https://wapo.st/2AHvwfk ("Serra's contributions to the decimation and abuse of native people who lived—sometimes forcibly—on his Catholic settlements rendered Serra's name unworthy of prominent display on campus.").

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[5] Many avowed Christians have expressed the sentiment that the Cross should remain precisely because of its Christian meaning. J.A.627-96.

Leading non-Christian veterans organizations, representing a myriad of faith groups including "Jewish, Hindu, Sikh, Buddhist, Native American spiritualist," as well as Muslim and Atheist, filed statements in the District Court attesting to the fact that the military service of non-Christian veterans "is excluded and disrespected when a Christian cross is presented as a public memorial." J.A.326-27; *accord* J.A.415-17, 1596-98. *See also* J.A.1537, 1540-41, 1592-95.

The U.S. Department of Veterans Affairs currently offers 71 diverse symbols for placement on rectangular headstones, including symbols for Humanists, Atheists, Sikhs, Baha'is, Wiccans, Buddhists, Native Americans, Mormons, and Shinto, among numerous other faiths that do not embrace the Latin cross as a symbol of their death and sacrifice. *See* U.S. Dept. of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, http://www.cem.va.gov/hmm/emblems.asp (accessed Jan. 12, 2019); Pet.App.35a.

B. Procedural History

Three local Humanist residents and the American Humanist Association commenced this lawsuit in 2014. J.A.27. Plaintiffs have each regularly encountered the Cross as residents and two of them cannot avoid the Cross in the course of their ordinary routines. Pet.App.13a. *See* J.A.29-30; C.A.App.448, 456-57, 485, 530-31, 537, 545. Plaintiffs do not wish to see the Cross torn down; they simply want it removed to private

property or modified into a non-religious memorial (such as a slab or obelisk). J.A.37; C.A.App.466.

In November 2015, the District Court granted summary judgment to Petitioners. Pet.App.54a. In October 2017, the Fourth Circuit reversed and remanded without "presuppos[ing] any particular result." Pet.App.31a-32a. Instead, the panel directed the District Court "to explore alternative arrangements that would not offend the Constitution." *Id.*

In reaching its holding that the Cross violates the Establishment Clause, the panel conducted a "detailed factual analysis of the Cross, including its meaning, history, and secularizing elements." Pet.App.20a-29a. It noted that the "Cross is by far the most prominent monument in the area, conspicuously displayed at a busy intersection, standing four stories tall, and overshadowing the other monuments" off to the other side of the road. Pet.App.24a. And unlike in cemeteries such as Arlington, it observed, there "are no other religious symbols present [here] . . . Christianity is singularly—and overwhelmingly—represented." Pet.App.29a. Thus, the Commission's monument "endorses Christianity—not only above all other faiths, but also to their exclusion." Pet.App.28a.

Judge Gregory concurred on standing and on the applicability of the test enshrined in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1970), but faulted the majority for focusing too heavily upon the "religious component" of the 40-foot-tall Latin cross. Pet.App.36a-38a, 41a.

The Fourth Circuit denied rehearing en banc. Pet.App.86a-105a. Judge Wynn concurred, reiterating that, "to accept the Commission's assertion that the Latin cross erected at the Bladensburg intersection does not convey a predominantly sectarian message would prohibit the ability of those who raised the symbol to prominence to continue to safeguard and define its primary meaning." Pet.App.95a. Judges Gregory, Wilkinson, Agee, and Niemeyer dissented. Pet.App.98a-105a.

SUMMARY OF ARGUMENT

I. The central principle of the Establishment Clause is that the government cannot align itself with a single religion.

I.A. Although Justices have disagreed upon whether and to what extent the Establishment Clause prohibits the government from favoring religion over nonreligion, there is no disagreement that the Clause means, at the very least, that government may not demonstrate a preference for one religion over *other religions*.

The Court has been unanimous that government-sponsored endorsement of religion is unconstitutional *when the endorsement is sectarian*, and this mandate is absolute, even when no coercion is present and the practice is longstanding.

I.A.1. Every Member of the Court to consider the question has agreed that a prominent *sectarian*

government display violates the Establishment Clause. Every Justice in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) joined an opinion citing a prominent Latin cross as an archetypal and "obvious" Establishment Clause violation. Every Justice in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) agreed that giving preferential access to a Latin cross on government property would violate the Establishment Clause. Every Justice in *McCreary County v. ACLU*, 545 U.S. 844 (2005) agreed that a solo or prominent government display of a *sectarian* version of the Ten Commandments would violate the Establishment Clause. And in *Salazar v. Buono*, 559 U.S. 700 (2010), the plurality reaffirmed what was said by Justice Kennedy in *Allegheny*, that the permanent erection of a Latin cross on conspicuous government property violates the Establishment Clause. Justice Alito expressed no doubt, moreover, that the Establishment Clause would forbid an official World War I cross on the National Mall. *Id.* at 728 (concurring).

I.A.2. Justices of this Court have been unanimous in recognizing the Latin cross as the preeminent symbol of Christianity. The Circuits have likewise been "masters of the obvious" on this point, and have uniformly found freestanding government cross monuments unconstitutional on the grounds that they exalt Christianity.

Conceived as a mammoth "Cross of Calvary, as described in the Bible" (J.A.428) and formally pronounced as a Cross "symbolic of Calvary" by the state official at the Cross's 1925 dedication ceremony, this 40-foot-tall Latin cross is without question, a Christian

symbol. Petitioners ask the Court to overlook that reality. They claim that the monument is "merely" "shaped like a cross," as if that were a coincidence (Legion Br.i; *accord* Comm'n Br.i); and they claim that the Cross is a "secular" "symbol of the war" rather than a Christian symbol (Legion Br.4; Comm'n Br.2, 5, 34). That distortion should be rejected, not only because it amounts to legal chicanery, but also because it works the very kind of harm to religion that motivated the Establishment Clause's passage.

I.B.1. When the government prominently displays a large Latin cross as a war memorial, it does more than just align the state with Christianity; it also callously discriminates against patriotic soldiers who are not Christian. Contrary to the Commission's argument that the Latin cross has "a significant secular meaning" as a symbol for "the fallen," "irrespective of their religion" (Comm'n Br.36, 24), Jews, Humanists, Muslims, Atheists, Buddhists, Unitarians, and others have made it clear, in this case and in others, that a Latin cross war memorial signifies that their sacrifices are unworthy of mention.

The Circuits are in complete agreement that the Latin cross: (1) transcends mere commemoration and promotes the Christian faith alone; (2) does not possess an ancillary meaning as a secular war memorial; (3) is not a generic symbol of death and sacrifice; and (4) sends a strong message of exclusion when prominently displayed by the government to honor veterans. Every Circuit to consider the constitutionality of a

government memorial cross—the Fourth, Seventh, Ninth, and Tenth—held the cross at issue unconstitutional.

I.B.2. *Buono* is not to the contrary. The plurality observed in *dicta* that the Latin cross is a common headstone in overseas cemeteries. Government defendants have since cited that observation to argue that the Latin cross, when used as a war memorial, is not a Christian symbol, or even a religious symbol, but merely a benign secular symbol of war that represents Jews, Atheists, and Muslims alike. But Justice Alito went out of his way to acknowledge that over 3,500 Jewish soldiers died in World War I and their graves are marked not by crosses but by Stars of David. Every Circuit that has addressed the issue since *Buono* has also found a clear distinction between an individual Christian headstone and a large government-sponsored war memorial cross.

The Latin cross in this case, moreover, does not evoke, nor was it intended to evoke, a small plain white cross in a foreign battlefield. Instead, the symbol was chosen to evoke "the Cross of Calvary, as described in the Bible." J.A.428.

I.B.3. If the government prevails, it will be a Pyrrhic victory indeed, at least for devout Christians. Allowing the government to recast the Latin cross as a benign secular symbol of war denigrates the religion that it symbolizes.

I.C. Every relevant contextual factor that this Court has previously considered affirms that this

Cross dramatically conveys a message of governmental support for Christianity in violation of the Establishment Clause. Pet.App.28a. The 4-story "Calvary Cross" was erected with the Town's blessing on a prominent parcel of Town-owned land. Today it is owned, extensively funded, actively used, promoted, and prominently displayed by the government. It stands alone on the traffic island, dwarfing its surroundings. The Cross is not displayed as an exhibit in a museum, on private property, or in another location that might detract from the government's having placed its imprimatur behind it. Indeed, rather than disassociate from the Cross, the Commission and the Town held an elaborate "Rededication" ceremony to publicly sanctify the Cross as a government war memorial. The length of time this Cross has stood as a permanent government tribute to Christian soldiers and Christian soldiers alone has served to intensify the exclusion felt by religious minorities.

II.A. Because the case can be decided on uncontested Establishment Clause principles, Respondents agree with the Commission that the Court need not take up the Legion's invitation to upend decades of precedent by reconsidering the test enshrined in *Lemon*.

But Respondents disagree that *Town of Greece v. Galloway*, 572 U.S. 565 (2014) furnishes an "independently sufficient ground" to uphold a massive Latin cross on the basis of "history and traditions." Comm'n Br.31-32. Our constitutional tradition, "from the Declaration of Independence" down to the present, has, as

Justice Scalia put it: "ruled out of order government-sponsored endorsement of religion . . . *where the endorsement is sectarian* . . . for example, *the divinity of Christ*." *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (dissenting; emphasis added).

"History and traditions" has never conferred an independent basis to uphold a practice under the Establishment Clause. This Court sustained legislative prayer based on the *sui generis* reasons *underlying* its long and unbroken history. And none of those reasons support this Cross: (1) The Cross is not an internal practice to accommodate lawmakers; (2) The Cross aligns the government with Christianity and categorically excludes all other faiths; and (3) There is no long, unbroken historical practice to speak of, and even if there were, such history could not override the central and absolute prohibition against government sectarian preferences.

II.B. Nor should the Court accept the Legion's invitation to overturn seven decades of Establishment Clause precedents by holding that the Establishment Clause does nothing but require the government to avoid religious coercion. Coercion is certainly a clear example of an Establishment Clause violation, but no more so than sectarian favoritism.

Even *Lemon*'s harshest critics have rejected what the Legion proposes. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, agreed that government endorsement of a *sectarian* monument violates the Establishment Clause "even

when no ersatz, 'peer-pressure' psycho-coercion is present." *Lee*, 505 U.S. at 641 (dissenting). Chief Justice Rehnquist, Justice White, and Justice Scalia agreed with Justice Kennedy that the Establishment Clause plainly forbids the government from permitting the permanent erection of a large Latin cross on the roof on city hall. *Allegheny*, 492 U.S. at 661 (concurring and dissenting).

III.A. If the Court reaches the *Lemon* question, it should reaffirm *Lemon*. *Lemon* was a carefully considered 8-1 opinion of then-Chief Justice Burger that distilled the entirety of the Court's Establishment Clause jurisprudence into a workable analysis. 403 U.S. at 612-13. The test has consistently been applied by this Court in religious display cases, yielding consistent results both in this Court and in the Circuits.

III.B. The government's prominent Cross runs afoul of the *Lemon* test because it endorses Christianity over all other religions (I.C.) and religion over non-religion. Pet.App.19a-31a.

IV.A. An affirmance will not doom other war memorials. The Bladensburg Cross is an aberration and no other monument like it has been identified. Petitioners and their *amici* claim there are "hundreds" of war memorials that include a cross. In reality, they have identified only a handful of freestanding cross monuments and all but a few are in cemeteries, museums, or other multi-faith complexes. The two smaller cross monuments in Arlington, for instance, are set amidst approximately 200 other monuments and

memorials and are surrounded by a diverse array of religious symbols, whereas here, Christianity is singularly and overwhelmingly represented.

IV.B. Nor would an affirmance portend the "mutilation" of the Cross. Quite the opposite, relocating the Cross away from the pollutants that are currently causing its demise may be the Cross's only chance of survival.

ARGUMENT

I. The Bladensburg Cross violates fundamental Establishment Clause principles irrespective of the *Lemon* test.

The "central meaning" of the Establishment Clause is that the government cannot favor or align itself with a single religion. *Lee*, 505 U.S. at 590; *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Bladensburg Cross does precisely that, because the Latin cross is not only *a* symbol of Christianity, but *the* preeminent symbol of that religion and that religion alone.

As such, Respondents agree with the Commission (at 22) that this case can be decided upon uncontested Establishment Clause principles without taking up the Legion's invitation to upend decades of precedent by reconsidering the test enshrined in *Lemon*. *See Lee*, 505 U.S. at 587 (rejecting invitation "to reconsider our decision in *Lemon*" because the case could be decided upon an uncontested principle). *See also Dickerson v.*

United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.").

A. The central principle of the Establishment Clause is that the government cannot align itself with any one religion.

Although Justices have differed about whether and to what extent the Establishment Clause forbids governmental preferences for *religion generally*, there is no disagreement that the Clause "means *at the very least* that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." *Allegheny*, 492 U.S. at 605 (emphasis added). *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting) ("I have always believed ... that the Establishment Clause prohibits the favoring of one religion over others.").

Our Framers knew "from bitter personal experience," that "whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 429, 431 (1962). That same history also "showed that many people had lost their respect for any religion that had relied upon

the support of government to spread its faith." *Id.* at 431.

In the Court's landmark decision applying the Establishment Clause to the states, both the majority and dissent relied on that history to unanimously conclude that the Clause forbids, at a minimum, actions that "prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). *See id.* at 31-32 (Rutledge, J., dissenting). Since *Everson*, this has remained an uncontested bedrock of Establishment Clause jurisprudence. *See Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968) (unanimously concluding that the "First Amendment mandates governmental neutrality between religion and religion" and calling the prohibition "absolute"); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Indeed, the Court reiterated this essential principle as recently as last term in *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson*, 456 U.S. 228 for the proposition that "'[t]he *clearest command* of the Establishment Clause is that one religious denomination cannot be officially preferred over another'") (emphasis added).

As Justice Scalia explained, "our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day," has "ruled out of order government-sponsored endorsement of religion . . . *where the endorsement is sectarian* . . . for example, *the divinity of Christ*." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting; emphasis added). He stated that the "Founders of our Republic knew the fearsome potential of sectarian

religious belief to generate civil dissension and civil strife." *Id.* at 646. He concluded, joined by Chief Justice Rehnquist, and Justices White and Thomas, that when the government expresses a preference for one religion over others, it violates the Establishment Clause "even when no ersatz, 'peer-pressure' psycho-coercion is present." *Id.* at 641.

Justice O'Connor agreed that "[w]hile general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances 'where the endorsement is sectarian.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) (quoting *Lee*, 505 U.S. at 641 (Scalia, J., dissenting)). Justice Thomas agreed in *Newdow* "that the Establishment Clause 'bar[s] governmental preferences for *particular* religious faiths.'" *Id.* at 53-54 (Thomas, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 855-56 (1995) (Thomas, J., concurring) (recognizing the clear constitutional "defect" of extending government funding "only to Christian sects")). Justice Rehnquist, too, had no doubt that the Clause was designed to bar the government "from asserting a preference for one religious denomination or sect over others." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (dissenting).

This particular command is not violated by "nonsectarian references to religion" such as "references to God," *Allegheny*, 492 U.S. at 603, nor is it violated by non-denominational displays of the Ten Commandments, *McCreary*, 545 U.S. at 893-94 (Scalia, J.,

dissenting); *id.* at 909 (noting that, unlike the cross, the "Ten Commandments are recognized by Judaism, Christianity, and Islam alike"). But this command *is* violated by a display that reflects an "allegiance to a particular sect or creed." *Allegheny*, 492 U.S. at 603-05.

1. The government violates the central command of the Establishment Clause when it places its imprimatur upon a potently sectarian symbol such as the Latin cross.

The absolute prohibition against sectarian favoritism applies with special force to religious displays. "[B]ecause of their fixed quality, displays have caused somewhat more concern than spoken words, which by their nature are fleeting." *Newdow v. Roberts*, 603 F.3d 1002, 1017 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring). "Speakers, no matter how long-winded, eventually come to the end of their remarks; . . . monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Pleasant Grove City v. Summum*, 555 U.S. 460, 479 (2009). "Governments have long used monuments to speak to the public," often "to remind their subjects of their authority and power." *Id.* at 470.

It is firmly settled that, irrespective of the *Lemon* test, the "government's use of religious symbols is unconstitutional if it effectively endorses sectarian

religious belief." *Pinette*, 515 U.S. at 765. And the "more sectarian the display, the closer it is to the original targets of the [C]lause." *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (Posner, J.).

As Justice Scalia wrote in *Pinette*, "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause." 515 U.S. at 766. He explained that the crèche in *Allegheny* was unconstitutional—despite being temporary and "privately sponsored" like the Klan's cross in *Pinette*—because the courthouse staircase was not "open to all on an equal basis, so the County was *favoring* sectarian religious expression." *Id.* at 764 (citing *Allegheny*, 492 U.S. at 599-600, & n.50).

In *McCreary*, Justice Scalia likewise had no doubt that the Establishment Clause would prohibit "governmental endorsement of a particular version of the Decalogue as authoritative." 545 U.S. at 894, & n.4 (dissenting). He further indicated that the government's promotion of a display invoking "Jesus Christ" would certainly be unconstitutional too. *Id.* at 897. Justices Thomas, Kennedy, and Chief Justice Rehnquist joined the part of his dissent that implied that "a solo display of the Ten Commandments [that] advances any one faith" would be unconstitutional. *Id.* at 909, & n.12. Thus, every Justice in *McCreary* agreed that a prominent *sectarian* display would violate the Establishment Clause. *Id.* at 869 (majority); *id.* at 883 (O'Connor, J., concurring); *id.* at 894 n.4 (Scalia, J., dissenting); *id.*

at 909, & n.12 (Scalia, Thomas, Kennedy, JJ., Rehnquist, C.J., dissenting).

A *permanent sectarian* monument also stands in sharp contrast to a seasonal display of a secularized holiday exhibited for a matter of weeks, rather than in perpetuity. Thus, in *Allegheny*, although Justices Kennedy, White, Scalia, and Chief Justice Rehnquist would have upheld the temporary, privately-sponsored crèche at issue, they admonished that a conspicuous permanent Latin cross would not meet the same fate and this was irrespective of whether *Lemon* applied:

> I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large Latin cross* on the roof of city hall. This is . . . because such an obtrusive year-round religious display would place the government's weight behind an *obvious* effort to proselytize on behalf of a particular religion.

492 U.S. at 661 (concurring in part and dissenting in part; emphasis added); *accord Buono*, 559 U.S. at 715 (plurality); *Newdow*, 603 F.3d at 1017 n.3 (Kavanaugh, J., concurring).

In *Buono*, the plurality reiterated that "'the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.'" 559 U.S. at 715 (quoting *Allegheny*, 492 U.S. at 661 (Kennedy, J.)). The plurality contrasted this "extreme" example with the 6-foot-tall remote cross at issue, opining it was "not an attempt to set the *imprimatur* of the state on a particular creed." *Id.*

Justice Alito reasoned that "in this part of the country . . . boundaries between Government and private land are often not marked." *Id.* at 724-25 (concurring). Private citizens placed "*their monument* on that spot, *apparently without obtaining approval* from any federal officials, and this use of federal land seem[ed] to have gone largely unnoticed for many years in all likelihood due to the spot's remote and rugged location." *Id.* (emphasis added). It would be different had the cross been constructed as "an official World War I memorial on the National Mall." *Id.* at 728.

This case does not involve a public forum for private, fleeting speech as in *Pinette*. *Cf. Town of Greece*, 572 U.S. at 582 ("Once [the government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates."). Nor does it involve an ephemeral display of a secularized national holiday (*Allegheny*) or a privately-maintained metal-pipe cross in the middle of the desert (*Buono*). And it most certainly does not involve a "benign" symbol that honors all veterans "irrespective of their religion." Comm'n Br. 19, 24. This case involves an "imposing 40-foot, 16-ton" permanent Latin cross (J.A. 1420) towering over a heavily-trafficked intersection that marks the entrance to town. Pet.App. 6a, 8a, 54a.

2. The Latin cross is not a secular symbol that represents Islam, Judaism, Atheism, and Christianity alike.

In no way is the Latin cross a "benign" "secular" symbol, honoring Christians and non-Christians alike. Comm'n Br.19, 24, 48. The Latin cross is an "*especially potent* sectarian symbol," *Pinette*, 515 U.S. at 776 (O'Connor, J., concurring; emphasis added), that "proselytize[s] on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting).

The potent sectarian meaning of the Latin cross is so "obvious" that in *Allegheny*, all nine Justices joined opinions citing it as a quintessential example of an unconstitutional display. *See id.* (Blackmun, J., joined by Brennan, Marshall, Stevens, and O'Connor, JJ.) (adornments could not "negate the endorsement of Christianity conveyed by the cross"); *id.* at 661 (Kennedy, J., concurring and dissenting, joined by Rehnquist, C.J., White, and Scalia, JJ.) (a large permanent prominently-displayed cross would place the "government's weight behind an obvious effort to proselytize on behalf of a particular religion").

Every Justice in *Pinette* agreed that the Latin cross is a sectarian symbol rather than a "benign" ecumenical invocation. 515 U.S. at 760, 766 (Scalia, J., joined by Rehnquist, C.J., O'Connor, Kennedy, Souter, Thomas, and Breyer, JJ.) (Latin cross was "sectarian religious speech"); *id.* at 771-72 (Thomas, J., concurring) (the cross is "one of the most sacred of religious

symbols"); *id.* at 776 (O'Connor, J., concurring, joined by Souter and Breyer, JJ.) (the "cross is an especially potent sectarian symbol"); *id.* at 792 (Souter, J., concurring) (it is "the principal symbol of Christianity around the world"); *id.* at 798, n.3 (Stevens, J., dissenting) ("the Latin cross is identifiable as a symbol of a particular religion, that of Christianity"); *id.* at 817 (Ginsburg, J., dissenting) (because the cross is " 'the principal symbol of Christianity' " the state may not permit "a display of this character").

No Justice in *Buono* contended that the Latin cross was a symbol of death or sacrifice for a non-Christian religion. 559 U.S. at 725-26 (Alito, J., concurring) ("The cross is of course the preeminent symbol of Christianity" and not a symbol to commemorate "Jewish soldiers"); *id.* at 747 (Stevens, J., dissenting) ("no participant in this litigation denies that the cross bears that [sectarian Christian] meaning").

Circuit judges of all stripes have likewise been "masters of the obvious," *Gonzales v. North Township Lake County*, 4 F.3d 1412, 1418 (7th Cir. 1993) (Bauer, Rovner, Timbers), in finding that the "religious significance and meaning of the Latin or Christian cross are *unmistakable*." *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (Anderson, Holloway, Lucero; emphasis added); *e.g.*, *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983) (*per curiam*) (Tuttle, Kravitch, Johnson) (the "latin cross is a universally recognized symbol of Christianity").

As relevant here, Judge O'Scannlain joined his fellow panelists (Lay and Pregerson) in holding a war memorial cross unconstitutional on the grounds that the "City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans." *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (*per curiam*) (O'Scannlain, J., concurring).

Notable district court judges have also called a spade a spade in cross cases. In striking down a large war memorial cross on a Marine base, Judge Thomas F. Hogan ruled: "The principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message." *Jewish War Veterans v. United States*, 695 F. Supp. 3, 15 (D.D.C. 1988).

Judge Carl Olaf Bue, Jr., a Nixon appointee and World War II army captain, declared a war memorial cross display (featuring a subordinate Star of David) unconstitutional on the grounds that "the cross and the Star of David are the primary symbols for Christianity and Judaism respectively" and "their primary effect is to give the impression that only Christians and Jews are being honored by the county." *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) (*per curiam*).

B. Using a Latin cross as a war memorial does not make the cross secular; it makes the war memorial Christian.

As the preeminent symbol of the Christian faith, the government's prominent display of the Latin cross clearly aligns the government with Christianity. But when the government displays the Latin cross as a government war memorial, it does more than that; it also "discriminat[es] against the beliefs of patriotic soldiers who [are not] Christian." *Allegheny*, 492 U.S. at 615 n.61 (citing *Eckels*, 589 F. Supp. at 234).

1. Neither the Latin cross generally, nor this Cross in particular, commemorates, honors, or respects non-Christian veterans.

The Commission maintains that the Latin cross has "a significant secular meaning to commemorate valor and sacrifice," and honors all "the fallen," "irrespective of their religion." Comm'n Br.6, 24, 36. But non-Christians are the arbiters of that question and their voices leave no room for ambiguity. Jews, Humanists, Muslims, Atheists, Buddhists, Unitarians and others have made it clear, in this case and in others, not only that the Latin cross does not honor them but that, when used as a government war memorial, the cross signifies that their sacrifices are unworthy even of mention.

As the Jewish War Veterans of the United States made emphatically clear in their *amicus* brief (at 2, 14) in *Buono* (No. 08-472):

> [T]he Government sends the unmistakable message that it deems less worthy of honor the sacrifices of non-Christian veterans, including the 250,000 Jewish service members who answered America's call to duty in World War I . . . . It defies logic to suggest that the Government would aim to remember Jewish (or other non-Christian) veterans by displaying the symbol of Christianity.

They added: "This [sacrifice] analogy works only for those who embrace the doctrine of atonement through Christ's crucifixion, and the comparison intended to honor veterans' sacrifices simultaneously reinforces Christian beliefs about the nobility of Jesus's crucifixion through association with brave Americans." *Id.* at 8. Even the Legion conceded: "[T]he cross as a symbol of death and sacrifice has its roots *firmly in the cultural heritage of Christianity*." J.A.719 (emphasis added).

For many Jews, the Latin cross not only symbolizes Christianity, but also the "outright oppression and persecution of Jewish people." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985) (en banc); *id.* at 781-82 ("The seal certainly does not memorialize their 'Christian heritage' but rather that of those who sought to extinguish their culture and religion.").

The Council on American Islamic Relations, the nation's largest Muslim civil rights organization, submitted a motion to oppose the Bladensburg Cross on the grounds that "Christian symbols do not represent Muslim service members." J.A.1596-98.[6]

The president of the Military Religious Freedom Foundation, which represents "a myriad faith and non-faith groups," including "Jewish, Hindu, Sikh, Buddhist, [and] Native American spiritualist," testified that the "Bladensburg Cross does not represent our tens of thousands of MRFF clients." J.A.415-17.

Jason Torpy, Iraq War veteran and president of Military Association of Atheists & Freethinkers, which has over 4,000 members, testified: "My military service, as well as the service of other non-Christians . . . is excluded and disrespected when a Christian cross is presented as a public memorial." J.A.326-28. *See also* J.A.333-36.

Numerous other non-Christian veterans and their families have made it known that the Bladensburg Cross does not commemorate their sacrifices. *E.g.*, J.A.1540-41 ("I'm a veteran with a purple heart . . . and an atheist. Guess I'm not included in those honored."); J.A.1538 ("My son was a soldier. He was not a christian. Why was his contribution any less valuable than

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[6] *See also* Robin Wright, *Humayun Khan Isn't the Only Muslim American Hero*, The New Yorker (Aug. 15, 2016), https://bit.ly/2D9oPV3 ("So many of us [Muslims] experience a form of P.T.S.D. because of a feeling we are not considered equal to our [Christian] colleagues.").

anyone else's?"); J.A.1537 ("I am a disabled combat Marine. I served with Muslims, Christians, atheists, even a Satanist and a Wiccan. So, why should it only represent [C]hristians?"); C.A.App.3262 ("I'm a veteran and an Atheist. How does this show reapect [sic] for my service in any way?").

Well before the Fourth Circuit concluded that a memorial cross "only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ" (Pet.App.20a-21a), the Circuits were already in firm agreement that the Latin cross "transcend[s] mere commemoration" and promotes the "Christian faith" alone (*Harris v. City of Zion*, 927 F.2d 1401, 1415 (7th Cir. 1991)); that the Latin cross "does not possess an ancillary meaning as a secular or non-sectarian war memorial" (*Trunk v. City of San Diego*, 629 F.3d 1099, 1116 (9th Cir. 2011)); and that because the cross is "not a generic symbol of death" but rather "a *Christian* symbol of death that signifies or memorializes the death of a *Christian*," *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010); the government's use of the Latin cross to honor veterans sends a strong message of "exclusion." *Trunk*, 629 F.3d at 1124-25.

The Ninth Circuit reiterated the point in *Buono v. Norton*, 371 F.3d 543, 549 n.5 (9th Cir. 2004), citing Judge O'Scannlain's concurrence in *Eugene*, *supra*, when it recognized that despite a sign designating the cross as a war memorial, and "indeed perhaps *because of it*," a government war memorial cross communicates

the objective message that it has "'chosen to honor only Christian veterans.'" (emphasis added).

Indeed, the lower courts have decided 33 cross cases (18 of which are Circuit decisions) (Br. in Opp.15-18 (17-1717))—and every case involving a cross displayed as a government memorial held the display unconstitutional. *Trunk*, 629 F.3d at 1123; *Duncan*, 616 F.3d 1145; *Buono*, 371 F.3d 543; *Eugene*, 93 F.3d 617; *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *Gonzales*, 4 F.3d 1412; *American Humanist Association v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014); *Jewish War Veterans*, 695 F. Supp. 3; *Eckels*, 589 F. Supp. 222. *See also Kondrat'yev v. City of Pensacola*, 2017 U.S. Dist. LEXIS 203588, at *21 n.4 (N.D. Fla. June 19, 2017) (Vinson, J.), *aff'd*, 903 F.3d 1169 (11th Cir. 2018) (finding argument that "the Bayview Cross is a war memorial" irrelevant in light of the "numerous appellate and district court cases ordering the removal of war memorial crosses").

This Court, too, has acknowledged the obvious: A government-sponsored Latin cross war memorial favors Christians while "discriminating against the beliefs of patriotic soldiers who [are not] Christian." *Allegheny*, 492 U.S. at 615 n.61 (citing *Eckels*, *supra*).

2. The Latin cross is not a universal secular World War I symbol and, even if it were, that's not why it was chosen here.

Petitioners claim that the Cross should be deemed secular because First World War overseas cemeteries consist of rows of little white cross headstones. Comm'n Br.2, 35; Legion Br.55-56. That argument is flawed in two respects. First, and obviously, the "mere fact that the cross is a *common* symbol" in cemeteries "does not mean it is a *secular* symbol." *Duncan*, 616 F.3d at 1161-62. "The Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol." *Trunk*, 629 F.3d at 1116. Second, this Cross (unlike the cross in *Buono*), was not designed to mimic World War I headstones; it was chosen precisely because of, not in spite of, its Christian meaning.

i. In World War I cemeteries, a cross marks a *Christian soldier's* grave and a Star of David marks a *Jewish soldier's* grave.

Petitioners rely on *dicta* from *Buono* pertaining to overseas headstones to support their contention that the Latin cross is a non-Christian symbol of war. Comm'n Br.34; Legion Br.55-56. This is what Justice Kennedy wrote:

> Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of

> small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

559 U.S. at 721. The assertion lacked any citation.

Justice Alito, on the other hand, went out of his way to clarify that the Latin cross does *not* reflect "the religious diversity of the American soldiers who gave their lives in the First World War." *Id.* at 726 (concurring). He stressed that more "than 3,500 Jewish soldiers gave their lives for the United States," and that their graves are marked with a "white Star of David." *Id.*

Since then, three Circuits (the Fourth, Ninth, and Tenth) have addressed challenges to memorial crosses. Each undertook an extensive analysis of expert reports and history books and concluded that Justice Kennedy's assertion was somewhat misleading.

As the Ninth Circuit explained, the "thousands of small crosses" referenced in *Buono* "serve as individual memorials to the lives of the *Christian soldiers* whose graves they mark, *not as generic symbols of death and sacrifice*," and "not [as] a *universal monument* to the war dead." *Trunk*, 629 F.3d at 1113, 1116 n.18 (emphasis added).[7] The Tenth Circuit similarly rejected the

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[7] As discussed in IV.A.1., the several other freestanding cross war memorials do not "lead to the conclusion that the cross has become a secularized representation of war memory" either. *Trunk*, 629 F.3d at 1114-15 (also rebuffing argument that there

argument that "the cross has become a secular symbol of death" because "fallen Jewish service members are memorialized instead with a Star of David." *Duncan*, 616 F.3d at 1161. *Accord* Pet.App.21a.

The Fourth Circuit agreed with the other Circuits that "a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol." Pet.App.21a. The court observed that the headstones of the fallen in Arlington include separate symbols for Buddhism, Wicca, Islam, Judaism, and Atheism, underscoring the fact that the Latin cross is not the symbol of death or sacrifice for non-Christians. Pet.App.25a-26a, 35a.

Moreover, the panel noted, "crosses used on World War I battlefields were individual—rather than universal—memorials to the lives of Christian soldiers." Pet.App.21a. In finding the respective displays unconstitutional, all three post-*Buono* Circuits recognized that when the Latin cross is prominently displayed as a *government war memorial*, it "suggests that the government is so connected to [that] particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating." *Trunk*, 629 F.3d at 1124-25.

In *Buono*, Justice Alito referred to photographs depicting both the Star of David and the Latin cross and opined that this "presumably reflected the religious

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are "countless" freestanding cross war memorials, finding fewer than ten).

makeup of the Armed Forces at the time of the First World War." 559 U.S. at 726 n.9 (concurring). In fact, our armed forces included not just 250,000 Jews, but also an estimated 22,500 Mormons,[8] 12,000 Native Americans,[9] 5,000 Muslims,[10] Chinese-American Buddhists, Japanese-American Shinto, atheists, and of course others. J.A.324-25, 108-09. None of these groups embrace the Latin cross as their symbol of death and sacrifice. *E.g.*, Pet.App.35a; J.A.79.[11]

Rather, the Star of David reflects the successful advocacy of the Jewish Welfare Board in protesting crosses, which had offensively been placed over some their dead. J.A.1200-02. An "American doughboy wrote in distress when graves of his fallen comrades were marked with Cross instead of Star of David headboards observing, 'Yesterday, I visited the cemetery where our dead comrades laid to rest, and there were

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[8] Danielle Gorman, *The Prophet with 6 Sons in WWI + More Latter-day Saint Connections Makes You Think*, LDS Living (Nov. 10, 2018), https://bit.ly/2HjEJAe.

[9] Olivia B. Waxman, *'We Became Warriors Again': Why World War I Was a Surprisingly Pivotal Moment for American Indian History*, Time Magazine (Nov. 23, 2018), http://time.com/5459439/american-indians-wwi/.

[10] Vivek Chaudhary, *The forgotten Muslim heroes who fought for Britain in the trenches*, The Guardian (Nov. 11, 2017), https://bit.ly/2IGU9yN.

[11] Notably, the French government offered three gravemarkers: a Christian Cross, a plain headstone with no religious symbolism, and a Muslim headstone with a curved, Moorish style top. J.A.165.

our Jewish boys, the sons of Moses and Jacob with a cross at the head of the their graves.'" J.A.107.

At the 1924 Congressional debate over replacing the temporary gravemarkers in those cemeteries, the Executive Director of the Jewish Welfare Board, Mr. H.L. Glucksman, testified on behalf of the "entire Jewry of America" that crosses did not honor Jewish soldiers and that they would prefer a plain slab. J.A.1199-1200. He urged, however, that "*if any religious symbol is erected over the graves, then Judaism should have its symbol over the graves of its dead.*" *Id.* (emphasis added). In turn, the National Catholic Welfare Conference testified that the Latin cross should be used over the 3,355 "Catholic men" who died "so their graves could be blessed." J.A.1198-99. *See also* J.A.1212-13 (seeking cross for "our Christian solders"); J.A.1185 (referring to "the cross of the Protestants and Catholics").

Not surprisingly, the Commission ignores the Jewish Welfare Board's testimony. Instead, it (at 6) selectively quotes part of a letter from a member of the American Battle Monuments Commission who stated it was her understanding that, "while Orthodox Jews desired that the Star of David mark the graves of their dead, some Reformed Jews desired 'that no distinction be made between them and their Christian comrades.'" Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, & Honor Our Military Fallen* 205 (2005). This simply coincides with the Jewish Welfare Board's

preference for a uniform slab (J.A.1201);[12] it does not support the Commission's assertion that "[s]everal Jewish families elected the cross for their loved ones' graves." Comm'n Br.6.

To this day, Jewish veterans continue to protest war memorial cross displays, making clear that, for them, the cross has not morphed into a benign secular symbol that honors their sacrifices. *See Trunk*, 629 F.3d at 1105; *Jewish War Veterans*, 695 F. Supp. 3; *Eckels*, 589 F. Supp. 222.

ii. The Bladensburg Cross does not evoke a World War I headstone nor was it intended to.

The crosses in overseas cemeteries are 3- to 4-foot-tall plain white marble Latin crosses. J.A.944-47, 1188. The cross in *Buono* was similarly a 5-foot-tall "*plain unadorned white cross*," and thus evoked the "image of the white crosses, row on row" in overseas cemeteries. 559 U.S. at 725 (Alito, J., concurring; emphasis added). But the Bladensburg Cross is not *small, plain, unadorned or white*. It is huge, measuring 40-foot-tall (J.A.914); it is thick concrete aggregate with "light brown with a reddish brown border" (J.A.914, 1372); and it is adorned with "decorative bands." J.A.1350. *See* J.A.701, 930. And it is the "town's most prominent symbol." J.A.868. It thus evokes "a message of aggrandizement and universalization of religion, and not the

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[12] The Quartermaster General also advocated for the slab. J.A.1175, 1231, 1439.

message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18. Pet.App.31a.

That the Bladensburg Cross looks nothing like those overseas crosses is not surprising because that was not the intent of the donors. The committee that oversaw its construction—aptly named the "committee on the Calvary Cross Memorial" (J.A.431)—intended to build a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible." Pet.App.7a; J.A.428. This intention was made explicit in numerous contemporaneous newspaper articles (Pet.App.73a; J.A.428-33) and by the state representative who, at the 1925 dedication ceremony, proclaimed the Cross to be "symbolic of Calvary." Pet.App.59a; J.A.216-17.

The Cross's designer, John Earley, did not attempt to mirror overseas gravemarkers. Rather, the "Cross borrowed from the mosaic and thin-panel methods developed at the Shrine [of the Sacred Heart, a Roman Catholic parish] . . . [c]onstructed concurrently with their string of church commissions." J.A.1349-50; C.A.App.2485-86.

Petitioners ignore all of this; instead, they rely on a single statement made by the fundraising committee's second treasurer a year after the Cross's groundbreaking, who referred to the Cross as a proxy for her son's grave when she was soliciting funds from a congressman. Comm'n Br.10; Legion Br.5. That mercenary plea from a single individual (whose son is not even named on the Cross (J.A.145, 989, 1025)) does nothing

to negate the Cross's patently sectarian meaning as a "Calvary Cross." And the Commission's attempt (at 38) to dismiss "Calvary" as a meaningless term of older times is unavailing. *See Town of Greece*, 572 U.S. at 579 ("The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today.").

Moreover, not only was the memorial not intended to mimic overseas World War I graves, but the Commission has since rededicated the Cross as a war memorial for all veterans of *all wars* and the Town has treated it as such. J.A.191-99, 223-25, 554, 868. And the Commission doubled down on the Cross's Christian origins by inviting a Catholic priest to deliver prayers at the rededication ceremony. J.A.195, 199-202.

3. Allowing the government to redefine the meaning of the Latin cross as a "secular" and "benign" symbol of all "the fallen"—to represent the sacrifices of Atheists and Muslims alike—would degrade religion in the very ways the Founders feared.

Allowing the government to co-opt a deeply sacred Christian symbol for its own purposes contravenes the Establishment Clause's "first and most immediate purpose," which "rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*." *Engel*, 370 U.S. at 431 (emphasis added).

The Founders were concerned about two forms of degradation. First, they feared that the union of government and religion would leave the impression that the endorsed faith was not strong enough to flourish without government support. As Thomas Jefferson observed, governmental religious favoritism "tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[13] Justice Jackson captured the corollary of this principle when he observed that it "is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Zorach*, 343 U.S. at 324-25 (Jackson, J., dissenting).

Second, the Founders were concerned that a union with government would strip the favored religion of its potency and water it down into a pablum for the masses. *See School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (such a union taints the favored religion "with a corrosive secularism"). "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring). "The favored religion may be compromised as

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[13] Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94-95 (John J. Patrick ed., 1995).

political figures reshape the religion's beliefs for their own purposes." *Lee*, 505 U.S. at 608 (Blackmun, J., concurring). Keeping religion out of the government's hands best enables religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*, 343 U.S. at 313.

Thus, as the Fourth Circuit rightly observed, allowing the Commission to display the Latin cross to symbolize "anything other than Christianity may be deemed offensive to Christians." Pet.App.21a. Reverend Brian Adams, pastor of Mount Rainier Christian Church, expressed this very sentiment in 2012 about the Bladensburg Cross:

> [I]t is the symbol of the son of God dying peacefully . . . . I believe that using the cross as a symbol of what our military did is blasphemy, equivalent to taking the Lord's name in vain, using the cross where God and Christ would not want it to be used. The [Bladensburg] Cross is there as a Christian symbol.

J.A.700-04. *Accord Eckels*, 589 F. Supp. at 234 n.16 ("Reverend Schulman, and Reverend Stevens testified that religious symbols in a county park have a detrimental effect on both Christianity and Judaism."); J.A.417, Pet.App.89a-93a; Vatican Radio, *Pope says the Cross is the gate of salvation, prays for youths after Guatemala blaze*, Abouna.org (Mar. 12, 2017), https://bit.ly/2Cn0tFM ("[t]he Christian Cross is not something to hang in the house 'to tie the room together' . . . or an ornament to wear").

This also precipitated Judge Winn's plea in oral argument (at 31:16-32:00), in response to the Legion's statement that the Latin cross "can also acquire secular significance," that "I would hope you don't water it down too much." That is the precise aim of the Commission's demand, which is that it be allowed to "alter[] [the Latin cross's] exclusively sectarian meaning" (at 16) by having it redefined as a "secular" and "benign" symbol of "military valor" for Atheists, Muslims, and Jews alike (at 2, 21, 24, 34).

The first form of degradation—the loss of "respect for any religion" that relies "upon the support of government," *Engel*, 370 U.S. at 431—also looms here. A leading Methodist clergyman warned over fifty years ago that the effect of allowing the government to display "holy things in public places" is "often that of a television commercial on a captive audience—boredom and resentment."[14] Or, as Justice Kennedy observed, "[to] place these religious symbols in a common hallway or sidewalk, where they may be ignored or *even insulted*, must be distasteful to many who cherish their meaning." *Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring and dissenting; emphasis added). *E.g.*, Steve Newton, *Nativity removed; governor says it 'mocks Christians'*, USA Today (Dec. 23, 2015), https://bit.ly/2CHfmEp; Ashitha Nagesh, *Woman gets grumpy complaint for festive 'dragon nativity' scene*, BBC News (Dec. 20, 2018), https://bbc.in/2TkDKkA; Laurel

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[14] Dean M. Kelley, *Beyond Separation of Church and State*, 5 J. Church & State 181, 190-91 (1963), https://www.jstor.org/stable/23913258.

Wamsley, *Satanic Sculpture Installed At Illinois Statehouse, Just In Time For The Holidays*, NPR (Dec. 4, 2018), https://n.pr/2Rz1ukj. *See also* C.A.App.3237.

C. Far from undercutting the government's imprimatur, the Cross's context only aggrandizes it.

This Court's cases make clear that the "[p]lacement of [a] cross on Government-owned land" is unconstitutional where it bears "the imprimatur of the state." *Buono*, 559 U.S. at 715; *accord Pinette*, 515 U.S. at 763-64. Stated differently, a cross on public land is unconstitutional where it connotes "an expression or demonstration of [government] approval or support." *Id.*

In making that assessment, the relevant contextual considerations identified by this Court include: (1) the extent of the government's support (ownership, funding, maintenance, etc.); (2) whether the display is permanent or ephemeral; (3) the display's prominence (size, juxtaposition, dominance); (4) whether, if the symbol has dual-secular meaning, it is integrated with other items such that the secular meaning predominates; (5) the nature of the property; and (6) in a borderline case involving an item with both a secular and religious meaning, whether its usage or absence of prior complaints indicates that its secular meaning predominates. *See Buono*, 559 U.S. at 720-21 (looking to the degree of government ownership, knowledge and involvement, size and visibility of the display, and

physical location); *Van Orden v. Perry*, 545 U.S. 677, 700-01 (2005) (Breyer, J., concurring) (relevant context included prominence, type of property, type of symbol, usage, and age); *Allegheny*, 492 U.S. at 598 ("the effect of a crèche display turns on its setting"); *id.* at 661 (Kennedy, J., concurring and dissenting) (emphasizing permanence and prominence as crucial factors).

In some cases, these considerations will yield an "obvious" answer, as when the government places a "large Latin cross on the roof of city hall," *id.*, or erects a World War I cross on the National Mall. *Buono*, 559 U.S. at 728 (Alito, J., concurring). This, too, is one such case. These factors overwhelmingly affirm the Fourth Circuit's finding that the monument "aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both." Pet.App.31a.

1. The Cross was erected with the Town's blessing and has been owned, funded, used, promoted, and prominently displayed by the government for decades.

In *Buono*, the plurality suggested that the cross at issue did not clearly bear the imprimatur of the state. Private citizens had placed "their monument" in the middle of the desert without "obtaining approval from any federal officials," and this use of federal land went "largely unnoticed for many years" due to the rugged

terrain. 559 U.S. at 724-25 (Alito, J., concurring). In the present case, the government's imprimatur is unmistakable.

First, unlike in *Buono*, the Bladensburg Cross was installed on Town property with the Town's blessing and involvement. Pet.App.7a, 56a-57a; J.A.64, 428, 462-63. Local, state, and federal officials actively participated in the Cross's groundbreaking and dedication ceremonies. Pet.App.7a, 39a, 56a-59a; J.A.433, 216-18. Indeed, the "Cross has been the site of speeches by major state and county government officials" since its inception. J.A.1425. And for the past few decades, the Town has been hosting and co-hosting events at the base of the Cross. *E.g.*, J.A.539-608.

Second, this Cross was erected because of its Christian meaning *and* that meaning was broadcast by the government. A state representative was the keynote speaker at the Cross's dedication, and publicly proclaimed the Cross to be "symbolic of Calvary." Pet.App.59a; J.A.442. Likewise, when the Commission rededicated the Cross in 1985, it invited a Catholic priest to deliver prayers and expressed a desire to "assimilate this relationship again." Pet.App.62a; J.A.195.

Third, this Cross is owned and maintained exclusively by the government on government property. *Cf. Allegheny*, 492 U.S. at 667 n.5 (Kennedy, J., concurring and dissenting) ("Neither the crèche nor the menorah at issue in this case is owned by a governmental entity."); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche displayed on private property).

Lastly, the Commission poured $100,000 of county taxpayers dollars into the Cross in 1985, subsequently spent an additional $17,000 on routine maintenance, and recently earmarked $100,000 for another massive renovation project. Pet.App.8a, 30a, 63a; J.A.292; C.A.App.2134, 1698. This Court has never sanctioned such extensive government funding for a religious display, let alone a massive sectarian monument. *See also Allegheny*, 492 U.S. at 664 (Kennedy) ("[n]either the city nor the county contributed significant amounts of tax money"); *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) ("the expenses 'were borne exclusively by the Eagles'" and "the monument requires virtually no maintenance"), *aff'd*, 545 U.S. at 682 (plurality); *Lynch*, 465 U.S. at 671 ("it cost the city $1,365" plus "$20 per year"); *cf. Stone v. Graham*, 449 U.S. 39, 42-43 (1980) ("the posted copies of the Ten Commandments are financed by voluntary private contributions") (citations omitted). Indeed, in *Buono*, the plurality stressed that when that cross fell into disrepair, "*community members* repeatedly took it upon themselves to replace it." 559 U.S. at 716 (emphasis added).

2. The Cross is a permanent, not ephemeral, monument.

Because this Latin cross is "viewed year-round," it also "brings together church and state in a manner that suggests their alliance" even more ardently than the unconstitutional crèche display in *Allegheny*. *Harris*, 927 F.2d at 1412. *See Allegheny*, 492 U.S. at 661, 664-65, n.3 (Kennedy, J., concurring and dissenting)

(distinguishing a "permanent," "year-round" and "continual" Latin cross on city property from a temporary crèche); *Newdow*, 603 F.3d at 1017 n.3 (Kavanaugh, J., concurring); *Friedman*, 781 F.2d at 782 ("This [cross] is not like the crèche display upheld in *Lynch*."); *Gonzales*, 4 F.3d at 1423 (the cross was "not seasonally displayed").

3. The Cross is the Town's most prominent monument.

Just as a permanent monument sends a more forceful message of government approval than an ephemeral one, a prominent one speaks more loudly than an obscure one. Thus, Justice Kennedy saw an "obvious" violation in the "obtrusive" placement of a cross "on the roof of city hall." *Allegheny*, 492 U.S. at 661 (concurring and dissenting); *accord Buono*, 559 U.S. at 715. Justice Alito expressed this same sentiment in *Buono* when he contrasted that remote cross, "seen by more rattlesnakes than humans," with one constructed as "an official World War I memorial on the National Mall." *Id.* at 725, 728 (concurring).

The Court made a similar observation when it struck down a crèche displayed in the lobby of a courthouse in *Allegheny*, 492 U.S. at 598. By "permitting the 'display of the crèche in this particular physical setting,'" the Court found, "the county sends an unmistakable message that it supports and promotes the . . . crèche's religious message." *Id.* at 600. For "[n]o viewer could reasonably think that it occupies this location

without the support and approval of the government." *Id.* at 599-600.

Standing four stories tall over a busy highway median that marks the entrance to town (J.A.40-41, 764, 918), this Christian monolith is "the town's most prominent symbol." J.A.868. As in *Allegheny*, and unlike *Buono*, no one could reasonably think that this Cross "occupies this location without the support and approval of the government." *Id.* *E.g.*, 23 CFR § 710.403(a); J.A.1484, 1501.

4. The Cross dominates its surroundings and is not integrated into a larger display.

The Cross also clearly "dominates its surroundings." Pet.App.31a; *see* J.A.44-47, 423-26, 764, 918, 931, 1514. It is thus incomparable to the small seasonal crèche in *Lynch*, which was integrated into an array consisting of, "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" 465 U.S. at 671. The Court found that, viewed with the rest of the commercial display, the "inclusion" of a small nativity did not "taint" the city's exhibit but merely represented a symbol of a secularized "National Holiday." *Id.* at 681-82, 686.

Even then, *Lynch* was a "difficult case." *Allegheny*, 492 U.S. at 594. Justice O'Connor was the tie-breaking vote, but she clarified that she only joined the majority because, "by referring repeatedly to '*inclusion* of the crèche' in the larger holiday display," the "*Lynch* majority recognized that the crèche had to be viewed in light of the total display *of which it was a part*." *Id.* at 624-25 (O'Connor, J., concurring) (emphasis added). Moreover, the "cross unmistakably signifies Christianity" whereas the crèche is a "mixed case." *St. Charles*, 794 F.2d at 270-72. "Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians." *Id.* But "the Latin cross has not lost its Christian identity." *Id. Accord Allegheny*, 492 U.S. at 664-65 (Kennedy, J., concurring and dissenting) (unlike a Latin cross, the crèche and menorah "have acquired a secular component").

This 40-foot-tall Cross is thus readily distinguishable from the 6-foot-tall Ten Commandments upheld in *Van Orden*. Not only are the Ten Commandments nonsectarian, but they "have become an archetypal symbol for law itself." *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1248-49 (10th Cir. 2009) (Gorsuch, J., dissenting). And as with the display in *Lynch*, the *Van Orden* display was added to an existing array, totaling "17 monuments" of similar size "and 21 historical markers," that, together, reflected "the state's political and legal history." 545 U.S. at 681-82, 688-90 (plurality). The plurality found that because the "Commandments have an undeniable [secular legal] historical meaning," the "*inclusion*" of this "monument *in*

this group has a *dual significance*." *Id.* at 681, 688-91 (emphasis added). Justice Breyer agreed that because of its dual meaning, displaying the Ten Commandments with numerous similar-sized and similar-themed monuments suggested that the state intended the "*nonreligious aspects* of the tablets' message to *predominate*." *Id.* at 701 (Breyer, J., concurring; emphasis added).

But the Latin cross is a *sectarian* symbol and has no "nonreligious" "connection" to our "Nation's history and government." Pet.App.22a. In *McCreary*, both the majority and the dissent agreed that a dominating or solo display of a *sectarian* version of the Ten Commandments would violate the Establishment Clause. 545 U.S. at 894 n.4 (Scalia, J., dissenting). In striking down the Decalogue, the majority observed that although the "courthouses contained other displays," there was no "suggestion that the Commandments display was integrated to form a secular display." *Id.* at 869 n.16.[15]

Similarly, in *Allegheny*, while there were Santa Claus figures and other secular decorations in the courthouse, and even a "gallery forum" with "art and other cultural exhibits," there were no such decorations *on the staircase*. 492 U.S. at 581, & 598 n.48. The "crèche, with its fence-and-floral frame" "was distinct."

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[15] Justice Scalia dissented because the display was nonsectarian and the walls "were already lined with historical documents and other assorted portraits" and the Commandments, in his view, had no "greater prominence." *Id.* at 903 (Scalia, J., dissenting).

Id. Indeed, the "floral frame, like all good frames, serve[d] only to draw one's attention to the message inside the frame." *Id.* at 599. This Cross is not integrated with other monuments either; rather, quite unlike the *Van Orden* and *Lynch* displays, this Cross was proposed, approved and erected in isolation, and stood as the only monument in the area for much of its history, and it remains the only monument on the median. Pet.App.22a-26a; J.A.40-53, 918, 984, 991-94.

Even if one considers monuments added in later years to a separate parcel across the road, the Cross is "by far the most prominent" clearly "overshadowing the other monuments." Pet.App.24a; J.A.44-47, 764, 931. It is *the entire Town's* "most prominent symbol." J.A.868. And like the floral frame in *Allegheny*, the "Cross's central position" in the middle of the highway on an island of its own "gives it a symbolic value that intensifies the Memorial's sectarian message." *Trunk*, 629 F.3d at 1123-24. *See* J.A.764, 984; J.A.1348 (referring to the Cross today as the "centerpiece").

5. The nature of the property on which this Cross stands makes the government's imprimatur unambiguous.

This Court has also considered the nature of the property on which a display sits. "[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692

(O'Connor, J., concurring); *accord Van Orden*, 545 U.S. at 742 (O'Connor, J., dissenting); *Summum*, 555 U.S. at 476 n.5. Similarly, a government display on private land may carry less government imprimatur than one on public land. Justice O'Connor, the fifth vote in *Lynch*, clarified in *Allegheny* that she grounded her *Lynch* decision in part on this ground. 492 U.S. at 626-27. *See also Buono*, 559 U.S. at 720 (plurality).

This Cross is not an artifact displayed as an exhibit in a museum or other multi-faith complex such as a cemetery (*infra* at IV.A.2.). Pet.App.94a. *Cf. American Atheists, Inc. v. Port Authority*, 760 F.3d 227, 233-36 (2d Cir. 2014) (upholding "a particular artifact" donated along with "more than 10,000 artifacts" displayed in museum); *Trunk*, 629 F.3d at 1115 n.16 (distinguishing the 1607 Cape Henry cross displayed as an exhibit in historic Jamestown).

Rather, this solitary "Calvary Cross" was deliberately placed on Town property and remains alone on the government traffic island as a government-dedicated war memorial. No one is free to erect other displays on that median. J.A.1484, 1501. And at no point between the Town's ownership and the Commission's did the government attempt to disassociate itself from the Cross. *Cf. Rosenberger*, 515 U.S. at 841-42 ("The University has taken pains to disassociate itself from the private speech involved in this case.").

6. The longevity of this Cross has intensified its exclusionary sectarian meaning.

The amount of time this Cross has stood as the "town's most prominent symbol" (J.A.868) has "serve[d] to intensify" the exclusion felt by religious minorities. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000). *See* J.A.697 ("I am an atheist who has lived in Hyattsville for 15 years. I was always bothered by the giant cross."); C.A.App.3225 ("It infuses the populace with the idea that our government is Christian."); C.A.App.3265 ("I guess that in Maryland church and state are interchangeable."); C.A.App.3279 ("I drive past this regularly; glad to see I'm not the only one bothered by it."); C.A.App.3250 ("I'm a second-class citizen, and they want me to remember it."). That sentiment is shared by both old-timers and newcomers. *E.g.*, J.A.698 ("[I] [just moved] 1.6 miles west of the Bladensburg Cross" and as "a member of a religious minority (Jewish)," "I am appalled to learn that the cross is owned by the State."); C.A.App.3242-43 ("I just drove past this last week for the first time and was shocked!"); C.A.App.451 ("when I [plaintiff Edwords] first encountered it, it immediately struck me as not proper. But . . . I didn't see any reason to pursue the matter until the San Diego case was settled.").

Petitioners overreach when they argue that Justice Breyer's concurrence in *Van Orden* holds that longevity is "determinative" regardless of how sectarian or prominent the display may be. Comm'n Br.44; Legion Br.58. The "measure of the seriousness of a breach

of the Establishment Clause has never been thought to be the number of people who complain of it," *Schempp*, 374 U.S. at 264 (Brennan, J., concurring), for the "First Amendment does not allow an establishment of religion merely because it is a popular establishment." *St. Charles*, 794 F.2d at 275-76.

Nor should religious minorities have to shoulder the burden of Establishment Clause policing. "The Clause is more than a negative prohibition." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring, joined by Souter and Breyer, JJ.). Each day "brings a new duty on the government's part, and a corresponding new right to seek vindication of the constitutional right in question." *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001).

Besides, Justice Breyer indicated that longevity was a tie-breaker only in a difficult "borderline" case involving a *nonsectarian* display that was not used for "meditation" or "religious activity." 545 U.S. at 700-03 (concurring). Of course, this "Calvary" cross is sectarian, has consistently been used for "prayer" during services, and "[n]othing in the record indicates that any of these services represented any faith other than Christianity." Pet.App.8a; *e.g.*, J.A.218 (First Baptist Church; St. Jerome's Catholic Church); J.A.474 (St. Luke's Protestant Episcopal Church; St. James Catholic Church); J.A.477 (St. Luke's); J.A.527 (same); J.A.598 (Faith-Deliverance-Soul Saving Station); J.A.610 (Father Chimiak St. Matthias Catholic Church); J.A.187 (same); J.A.199-202 (same). *See McCreary*, 545 U.S. at 869 (because a pastor "testified

to the certainty of the existence of God" during the Ten Commandments' dedication ceremony, the "reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message"); *Allegheny*, 492 U.S. at 599 (crèche's use in annual Christmas-carol program dedicated to "world peace and families of prisoners of war" only served to "augment the religious quality of the scene" because some of the carols were religious).

Equally central to Justice Breyer's reasoning was the fact that there w[illegible] no evidence the delay in litigation was "due to a climate of intimidation." 545 U.S. at 702 (concurring). There are many reasons why religious minorities would not want to be the face of a challenge to a popular Christian monument (as plaintiffs or lawyers): "Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, *the risk of social ostracism can be powerfully deterrent*." *Id.* at 747 (O'Connor, J., dissenting; emphasis added).

Those considerations are highly salient here. "[A] person who dared bring a challenge to the Cross for much of [its] 90 years would have faced possible rebuke." Pet.App.23a-24a. Maryland's blasphemy law, which criminalized denouncing "our Saviour Jesus Christ," was enforced *until 1970*. *West*, 9 Md. App. 270. Atheists were forbidden from holding public office until this Court intervened *in 1961*, and the state constitution *still* contains the provision. Pet.App.23a-24a. And in the 1920s in Bladensburg, the Latin cross was

used by the Klan to intimidate Jews and other religious minorities. J.A.80, *see* J.A.117-21, 127, 495-96, 506, 518, 523.

Indeed, the "possible rebuke" has come to pass. *E.g.*, J.A.652, 682-90, 627-31; David Gonzales, *Pensacola Man's Facebook Post Targets AHA Lawyer In Cross Case, Ignites Firestorm*, ABC3 (June 22, 2017), https://bit.ly/2RtBqeH ("Some attack Miller with derogatory names and gun emojis. One comment even asks for violence wishing her death.").

In sum, the Bladensburg Cross violates the central premise of the Establishment Clause by aligning the government (the Town and the Commission) with the preeminent symbol of Christianity. That the Cross is a war memorial only adds insult to injury.

II. The "history" and "coercion" tests advocated by Petitioners and their *amici* have little to commend themselves and, in any event, would not change the outcome here.

The Commission does not urge this Court to jettison the *Lemon* test, but it does argue that *Town of Greece* furnishes a "second, independently sufficient ground" to uphold this Christian monolith on the basis of "history and tradition." Comm'n Br.22, 32-33. The Legion (at 53), in turn, demands a cataclysmic overhaul in Establishment Clause jurisprudence, asking the Court to replace *Lemon* with a "coercion test" that would dismantle not just the *Lemon* test but the entirety of this Court's Establishment Clause

jurisprudence, beginning with *Everson*. *Accord* U.S. Amicus Br.13-16. The Legion contends that "passive displays like the Peace Cross will almost never be coercive precisely because they are 'passive.'" Legion Br.53. Thus, the Legion is demanding a categorical rule that gives the greenlight to virtually all religious displays, regardless how sectarian, conspicuous, contemporary, or religiously motivated. These arguments are as "seismic" as they are "unconvincing." *McCreary*, 545 U.S. at 861.

A. The "history" test is unworkable and unprincipled, has been repeatedly rejected by this Court, and is in any event met here.

1. *Town of Greece* did not modify the legal standard for legislative-prayer, let alone for Establishment Clause jurisprudence generally.

The argument that *Town of Greece* "held that a display" is constitutional if it "fits within a longstanding history or tradition" (Comm'n Br.20, 31, 44; *accord* Legion Br.18), is "interpretive jiggery-pokery," *King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting). To be sure, *Town of Greece* did not apply *Lemon*, but it also didn't overrule it. Instead, it simply applied and extended *Marsh v. Chambers*, 463 U.S. 783 (1983), to local legislative bodies. As Justice Alito summarized: "All that the Court does today is to allow a town to follow a practice that we have previously held

is permissible for Congress and state legislatures." 572 U.S. at 603 (concurring).

In *Marsh*, legislative prayer was upheld in a narrow opinion by Chief Justice Burger. The same term, in another decision written by Justice Burger, the Court applied *Lemon* to invalidate a "symbolic benefit" to religion. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 125-26 (1982). Thereafter, the Court explained that *Marsh* is "not useful" outside the legislative-prayer context. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). Since then, the Court has consistently and repeatedly applied *Lemon* in religious-display cases. *See, e.g.*, *McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53; *Lynch*, 465 U.S. at 683. *See also Van Orden*, 545 U.S. at 703-04 (Breyer, J., concurring) (ultimately applying all three *Lemon* prongs).

Town of Greece, did not discuss *Lemon*, let alone overrule it. But it did rely on Justice Kennedy's concurrence in *Allegheny*, which both condemned a government-sponsored cross *and* expressed contentment to "remain within the *Lemon* framework." 492 U.S. at 661, 655 (concurring and dissenting). Justice Kennedy, who authored *Town of Greece*, had also joined the majority in *Santa Fe*, 530 U.S. 290, which invalidated prayer under *Lemon*'s purpose and effect prongs—a result that he noted in *Town of Greece* was not impacted by the decision. 572 U.S. at 587.

2. This Court has never held—and indeed has disavowed—that a practice is authorized under the Establishment Clause simply because it has a strong historical pedigree.

This Court has consistently maintained that "no one acquires a vested or protected right in violation of the [Establishment Clause] by long use, *even when that span of time covers our entire national existence and indeed predates it*." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970) (emphasis added). In *Walz*, although the Court had looked to history, it also evaluated both the purpose and effect of the statute (as in *Lemon*), reaffirming that "the basic purpose" of the Establishment Clause is "to insure that *no religion be sponsored or favored*." *Id.* at 669, 672-73, 678 (emphasis added). In striking down the maintenance and repair provisions of a statutory scheme in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973), the Court reiterated that historical acceptance, without more, could not legitimize the practice.

Indeed, the Court has repeatedly struck down practices with strong historical pedigrees. The 6-1 *Engel* decision struck down nondenominational school prayer, 370 U.S. at 425, notwithstanding the New York Court of Appeals finding that "[a] few seconds of prayer in the schools, acknowledging dependence on Almighty God, is consistent with our heritage of 'securing' the blessings of freedom which are recognized in both the Federal and State Constitutions as having emanated

from Almighty God" and is "an integral part of our national heritage and tradition." *Engel v. Vitale*, 10 N.Y.2d 174, 179 (1961). In this Court's view, it was "an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies." 370 U.S. at 427.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court struck down a release-time program despite the practice's long history. *See id.* at 256 (Reed, J., dissenting) (discussing historical acceptance of practice). The Court invalidated the Maryland oath in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), notwithstanding "much historical precedent for such laws." *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("The fact that such exemptions are of long standing cannot shield them from the strictures of the Establishment Clause.") (citing *Walz*, 397 U.S. at 678).

Marsh reaffirmed the *Walz* passage quoted above, but found that "far more [] than . . . historical patterns" authorized the practice. 463 U.S. at 790. It was the reasons *underlying* that long history that proved controlling. And those reasons were threefold: (1) The practice was internal and intended to accommodate the spiritual needs of lawmakers rather than to promote religion to the public (*id.* at 791-93, n.16); (2) The practice was ecumenical and nondiscriminatory; it did

not "advance any one faith" in the prayers or the clergy selection (*id.* at 792-95); and (3) The First Congress authorized legislative prayer at the same time that it produced the Bill of Rights. *Id.* at 790-91.

The Legion (at 18) rests its claim to a sea-change on Justice Kennedy's statement in *Town of Greece* that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." 572 U.S. at 577. But that passage simply means "that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the *specific practice*" was "accepted by the Framers" and has "withstood the critical scrutiny of time and political change." *Id.* (emphasis added). The Court specifically cautioned that its opinion "must *not* be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 576 (emphasis added). And in upholding local legislative prayer, the Court relied on the same underlying considerations as *Marsh*, none of which justify sustaining this 40-foot Latin Cross, *infra*.

3. Even if *Town of Greece* were applicable here, it would not call for a reversal.

i. This imposing 40-foot Cross is not an internal practice to accommodate the spiritual needs of lawmakers.

First, Bladensburg's "monster calvary cross" (J.A.431), unavoidable to thousands of motorists daily (J.A.1013), is not an "internal act" to "accommodate the spiritual needs of lawmakers." *Town of Greece*, 572 U.S. at 587-88. *Marsh* involved "'government officials invok[ing] spiritual inspiration entirely for their own benefit.'" *Id.* (citation omitted). Central to *Town of Greece*'s holding was the fact that the audience "for these invocations is not, indeed, the public but lawmakers themselves." *Id.* And unlike prayers, "which by their nature are fleeting," *Newdow*, 603 F.3d at 1017 n.3 (Kavanaugh, J., concurring), this Christian monument is a permanent embodiment of the government's reverence for its Christian soldiers.

ii. The Bladensburg Cross is not ecumenical.

Second, the Cross "proselytize[s] on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting). "Historical practices" do not support government displays that align the government with one particular religion. *McCreary*, 545 U.S. at 894, 897-98 (Scalia J., dissenting). *Town of*

Greece upheld legislative prayer based on the Court's understanding that "the Framers considered legislative prayer a *benign* acknowledgment" of religion because "no faith" was "excluded" or "favored." 572 U.S. at 571, 577. The Court stressed the importance of "nondiscrimination" and upheld Greece's practice because even an "atheist" could "give the invocation." *Id.* at 571, 585.

iii. There is no long, unbroken, and unambiguous history accepted by our Framers of conspicuously displaying massive solitary Latin crosses or using the Latin cross as a non-Christian military symbol.

Lastly, there "is a complete lack of evidence that our founding fathers were aware of the practice of placing crosses" for prominent display on federal land. *Eckels*, 589 F. Supp. at 237. *See Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) ("there is no evidence of an 'unambiguous and unbroken history' of displaying religious symbols in judicial buildings"); *Lynch*, 465 U.S. at 719-21, 724-25 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.) ("there is no evidence whatsoever that the Framers would have expressly approved . . . a nativity scene").

Petitioners point to nothing to the contrary. Instead, they rely on the actions of "the Jamestown colonists" and other Christian "European settlers" long before the Constitution was ratified and even longer

before the Establishment Clause was applied to the states in 1947. Comm'n Br.45. But as Justice Kennedy in *Allegheny* made clear:

> [T]he relevant historical practices are those conducted by governmental units *which were subject to the constraints of the Establishment Clause*. Acts of "official discrimination against non-Christians" perpetrated in the 18th and 19th centuries by States and municipalities *are of course irrelevant to this inquiry*, but the practices of past Congresses and Presidents are highly informative.

492 U.S. at 670 n.7 (concurring and dissenting; emphasis added). "It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate." *Zorach*, 343 U.S. at 318-19 (Black, J., dissenting). "With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, . . . and all of these had from time to time persecuted Jews." *Everson*, 330 U.S. at 9.

The closest "Framers" evidence the Commission finds is George Washington's use of the "Grand Union Flag." Comm'n Br.46. But the "cross" in that flag was not a Latin cross at all; it was the "British Union Jack" replicating the Flag of Great Britain. Michael Corcoran, *For Which It Stands, An Anecdotal Biography of the American Flag* 27-30 (2002). The "crosses" used by the Union Army (Comm'n Br.46) were not Latin

crosses either. The Union Army used the cross pate (a variant of the Maltese Cross or Iron Cross), which would later morph into the "Distinguished Service Cross, Navy Cross and Distinguished Flying Cross," none of which "replicate the Latin or Celtic Cross" and each employs a "number of symbols" to make it "a distinctive symbol." J.A.147-53. *See St. Charles*, 794 F.2d at 271-72 (while the "Iron Cross" and the "Maltese—eight-pointed—cross that is the principal German military decoration," have lost their Christian association, "the Latin cross has not").

The Commission goes on to discuss early 20th century examples of crosses used "to honor the contributions of American servicemen and to memorialize the dead." Comm'n Br.47. But those crosses post-date the Founding by more than one hundred years. And the fact that the crosses were used does not make them *secular*, let alone render them akin to "In God We Trust" and other "benign invocations of religion." *Cf.* Comm'n Br.16, 19, 24, 49. Again, Jewish groups have been saying loudly and clearly, as they did in the 1920s, that the Latin cross was (and is) not a "symbol of sacrifice" for their servicemembers. J.A.1199-1200. The two Catholic groups made equally clear to Congress that the cross was not a "benign" symbol for non-Christians, but rather, a sacred symbol for "Catholic men" and "Christian soldiers" so their graves "could be blessed." J.A.1189-99, 1212-13.

The "hundreds" of "Crosses of Sacrifice in Commonwealth countries' World War I cemeteries" (Comm'n Br.9) assuredly *do not* reflect the cross's

"secular" non-Christian meaning (Comm'n Br.34-35) either. The Commonwealth War Graves Commission chose the cross in "recognition of the fact that we are a Christian Empire." Sir Frederick Kenyon, *War Graves: How the Cemeteries Abroad Will Be Designed* (1918), http://handle.slv.vic.gov.au/10381/90357. This, of course, "is entirely consistent with a country that unites Church and State." J.A.163-64.

Moreover, the British government did not "impose a sectarian Cross over the graves of Hindus, Muslims, Sikhs, Buddhists, Jews, and other soldiers." J.A.157. *See* J.A.154-55. In fact, the Commonwealth War Graves Commission erected sectarian monuments for religions other than Christianity. J.A.157-60. For instance, the Indian Memorial at Neuve Chapelle commemorates over 4,700 Indian soldiers and features no cross. J.A.157-58.

Petitioners also cite the history discussed in *Lynch* and *Van Orden*. Legion Br.35-40; Comm'n Br.19, 24, 32, 50. *Lynch* described "official references to the value and invocation of Divine guidance," "God" in the national motto and pledge, the display of religious paintings in museums, and the depiction of Moses with the Ten Commandments that graces this Court's oral-argument chamber. 465 U.S. at 675-78. Nowhere in that opinion can one find historical support for displaying *crosses*.

The *Van Orden* plurality canvassed governmental buildings, presidential papers, and legislative enactments for display and mention of the *Ten*

Commandments. 545 U.S. at 688-90. But the Commandments "are not so closely associated with a single religious belief." *McCreary*, 545 U.S. at 909 (Scalia, J., dissenting).[16] In contrast, as Justice Scalia concluded, the Framers would have *condemned* a display that aligned the government with a sectarian symbol, such as a "particular version of the decalogue." *Id.* at 894 n.4 (Scalia, J., dissenting).

Indeed, Justice Scalia canvassed founding-era history to conclude: "*All* of the actions of Washington and the First Congress," and "*all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ." *Id.* at 897. Justice Scalia noted, for example, that Washington's Proclamation "was scrupulously nondenominational." *Id.* at 893.

Jefferson demanded equal treatment of "the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination," 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). Madison, in turn, was contemptuous of prejudice over "Jews, Turks & infidels" being elected to office. Robert S. Alley, *James Madison on religious liberty* 72 (Prometheus Books 1985). It thus defies common sense to think that they would have sanctioned a 40-foot-tall government war memorial that discriminates against thousands of

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[16] The plurality also referenced stones inside the Washington Monument that contain Biblical citations. 545 U.S. at 689 n.9. The stones' size and their placement *inside the monument* make them a conceptual world apart from this 40-foot-tall Latin cross. *Compare* J.A.1570, *with* J.A.765, 931.

"Jewish soldiers," *Buono*, 559 U.S. at 725-26 (Alito, J., concurring), and all other patriotic non-Christian soldiers, *Allegheny*, 492 U.S. at 615 n.61.

The Legion contends (at 19) that the "inquiry is broader than merely asking whether the specific practice" was "accepted by the Framers," because in *Allegheny*, 492 U.S. at 670, Justice Kennedy was concerned with invalidating "'practices with no greater potential for an establishment of religion'" than those accepted traditions of our Founding. But by "practices with no greater potential," Justice Kennedy meant those that have become part of "our expressive idiom, similar to the Pledge of Allegiance." *Town of Greece*, 572 U.S. at 587. Even the Commission (at 33) concedes that *Town of Greece* does not uphold "intrusive sectarian content."

Furthermore, Justice Kennedy also asked whether the historical practice has "withstood the critical scrutiny of time and political change." *Id.* at 566. Cross displays have been challenged many times and in 30 out of 33 cases, the displays have been *struck down*. Br. in Opp. 15-18 (17-1717). War memorial crosses, in particular, have *uniformly* been struck down. *Id.* at 15-20.

4. The "history" test is neither a workable nor principled approach to religious-display cases.

The foregoing highlights the senselessness in applying *Marsh* and *Town of Greece* to religious displays specifically, and outside of the legislative prayer context generally. One "cannot seriously believe that the

history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations." *Nyquist*, 413 U.S. at 820 (White, J., dissenting, joined by Rehnquist, J.). Just as it is "virtually impossible to determine the singular 'motive' of a collective legislative body," *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia, J., concurring), the "Framers simply did not share a common understanding of the Establishment Clause." *Lee*, 505 U.S. at 626 (Souter, J., concurring).

Thomas Jefferson and Andrew Jackson both refused on Establishment Clause grounds to declare national days of Thanksgiving or fasting. *Marsh*, 463 U.S. at 807 (Brennan, J., dissenting). John Jay and John Rutledge "opposed the motion to begin the first session of the Continental Congress with prayer." *Id.* at 791. Madison refused to issue Thanksgiving proclamations and prayer, but later, amid the political turmoil of the War of 1812, did so on four separate occasions. Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Quarterly 562, and n.54 (1946). Although this Court concluded in *Marsh* that the Founders approved paid chaplains, based largely on Madison's approval, Madison later and unambiguously expressed the view that the practice was unconstitutional. *Id.* at 534, 558.

So what kind of unanimity would be required to render a practice sufficiently historically supported? What if a practice doesn't date back to the Founding? What is "without meaningful controversy?" Comm'n Br.33. Is one or two lawsuits enough? A test with that kind of unbounded line-drawing is nothing more than

an invitation to judges to introduce their biases into their judging.

The "history" test also fails to account for the fact that "[t]he first Congress was—just as the present Congress is—capable of passing unconstitutional legislation." *Van Orden*, 545 U.S. at 726 n.27 (Stevens, J., dissenting). The First Congress "could raise constitutional ideals one day and turn their backs on them the next." *Lee*, 505 U.S. at 626 (Souter, J., concurring). And "we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history." *McDonald v. City of Chi.*, 561 U.S. 742, 875-76 (2010) (Stevens, J., dissenting). That history is also replete with "rank forms of discrimination" against religious minorities—a history that we would hardly want to see enshrined today.

This record alone captures the country's changing morays. The Legion held the "greatest ministrel [sic] show" (produced by John B. Rogers) to benefit the "Memorial Cross," raising $250. C.A.App.2088; J.A.210. "[M]any pretty females" were "donated" for this event too. *Id.* The Legion also fundraised through fun carnival games like "Coon in Barrel" and "Japanese Board." C.A.App.2075. Indeed, a "number of Klansmen were members of the American Legion during this era." J.A.120. Do we really want to settle on a test that fails to consider the values that our nation has developed since that era?

B. Holding that the Establishment Clause does nothing more than preclude religious coercion would write the Establishment Clause out of the Constitution and overturn seventy years of precedent.

1. This Court has consistently rejected the argument that coercion is a necessary requirement for an Establishment Clause violation.

This Court has repeatedly held that the Establishment Clause "'does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.'" *Wallace*, 472 U.S. at 60 n.51 (quoting *Engel*, 370 U.S. at 430); *accord Nyquist*, 413 U.S. at 786-87 ("The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause."); *Schempp*, 374 U.S. at 223 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

Rather, the Establishment Clause proscribes the government from "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," *Allegheny*, 492 U.S. at 593 (internal quotation marks omitted), *even if the government does not "impose pressure" on individuals to participate. Board of Education v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring). *See, e.g., Edwards*,

482 U.S. at 593 (invalidating statute requiring instruction in "creation science" because it "endorses religion"); *Texas Monthly*, 489 U.S. at 17 (tax exemption benefiting only religious publications "effectively endorses religious belief" independent of coercion); *Epperson*, 393 U.S. 97 (invalidating non-coercive law that barred teaching of evolution).

2. The coercion-only standard is unworkable, unprincipled, and akin to no test at all in the context of religious displays.

The Court has avoided making coercion the *sine qua non* of the Establishment Clause for good reason: Neither the text, history, nor purpose of the Establishment Clause supports it; the standard cannot be reconciled with its precedents; and it would yield harrowing, unprincipled, and inconsistent results.

Textually, if coercion were a necessary element, then the Establishment Clause would be redundant of the Free Exercise. For laws that coerce nonadherents to "participate in any religion or its exercise," *Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring and dissenting), would also violate their right to religious free exercise. *See Schempp*, 374 U.S. at 223. But the Establishment Clause "unquestionably has independent significance." *Welsh v. United States*, 398 U.S. 333, 373-74 (1970) (White, J., dissenting).

As a historical matter, although coercion is clearly forbidden, it cannot be the only thing the Framers had

in mind. Otherwise, Jefferson's "wall" metaphor and his view that Thanksgiving proclamations ran afoul of the Clause, *supra*, would make little sense. *Lee*, 505 U.S. at 622 (Souter, J., concurring). That Madison also "expressed so much doubt about the constitutionality of religious proclamations" suggests "a brand of separationism stronger even than that embodied in our traditional jurisprudence." *Id.* at 625-26.

The coercion-only standard would also fail to guard against the three primary evils against which the Establishment Clause was intended to forestall: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668. It would allow the government to opine on Catholic dogma, for example, and to enter into any other oppressive, but non-coercive, "union of civil and ecclesiastical control." *Larkin*, 459 U.S. at 127 n.10 ("At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control.") (citation omitted). *See also Grumet*, 512 U.S. at 696, 704 ("legislative favoritism along religious lines" is unconstitutional even if no one is coerced by it); *accord id.* at 729 (Kennedy J., concurring).

Indeed, a coercion-only standard would do violence to what this Court has deemed the *touchstone* for this Court's Establishment Clause jurisprudence; that is, that the "First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson*, 393 U.S. at 104. Relying on the history of the Clause, Justice Black in

Everson outlined the considerations that have become the bedrock of Establishment Clause jurisprudence:

> Neither a state nor the Federal Government can . . . pass laws which aid one religion, *aid all religions, or prefer one religion over another*. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in religion . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

330 U.S. at 15-16 (emphasis added). The "principle of neutrality has provided a good sense of direction" to courts, and a necessary one, because it responds to "the major concerns that prompted adoption of the Religion Clauses." *McCreary*, 545 U.S. at 860, 875-76. The Framers understood that "nothing does a better job of roiling society" than when "the government weighs in on one side of religious debate." *Id.*

Even Justices who have narrowly interpreted the Establishment Clause have conceded that it mandates religious neutrality above and beyond non-coercion. *See Rosenberger*, 515 U.S. at 862 (Thomas, J., concurring) ("The constitutional demands of the Establishment Clause may be judged against either a baseline of 'neutrality' or a baseline of 'no aid to religion.'"); *Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988) (opinion by Rehnquist) (reaffirming the requirement of "'neutrality among religions, and between religion and nonreligion'") (citation omitted); *Edwards*, 482 U.S. at

616-17 (Scalia, J., dissenting) ("governmental 'neutrality' toward religion is the preeminent goal"); *Walz*, 397 U.S. at 694-95 (Harlan, J., concurring) (the Clause requires *both* "neutrality" and "voluntarism").

Yet, under the radical standard the Legion proposes, nothing would prevent the government from "approv[ing] the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty." *McCreary*, 545 U.S. at 880. As Justice Scalia made clear: "our constitutional tradition . . . rule[s] out of order government-sponsored endorsement of [sectarian] religion—even when no legal coercion is present." *Lee*, 505 U.S. at 641 (dissenting).

Given its shortcomings, it's not surprising that the coercion test has been roundly criticized by Justices of this Court. In *Allegheny*, the majority refused to adopt the rule that "religious symbols do[ ] not violate the Establishment Clause unless they are shown to be 'coercive.'" 492 U.S. at 597 n.47 (Blackmun, J.). Justices O'Connor, Stevens, Brennan, and Marshall all criticized a coercion standard as unworkable in religious display cases. *Id.* at 627-28 (O'Connor, J., concurring); *id.* at 649-50, & n.6 (Stevens, J., concurring and dissenting, joined by Brennan and Marshall, JJ.) (finding it "unlikely that 'coercion' identifies the line between permissible and impermissible religious displays any more brightly than does 'endorsement'"). Neither the plurality nor Justice Breyer deemed the coercion test "useful" in *Van Orden*, 545 U.S. at 686 (plurality

opinion); *cf. id.* at 693-94 (Thomas, J., concurring) (suggesting the Court should apply the direct coercion test).

Even in the legislative-prayer context, Justice Kennedy's opinion in *Town of Greece* was concerned not only with coercion, but also with the discrimination and exclusion of religious minorities. 572 U.S. at 583, 586, 589. He crystalized this point in concluding that the government cannot "exclude *or* coerce nonbelievers." *Id.* at 591 (emphasis added). Justice Alito agreed that he would view the case "very differently" if the town had excluded Jews or other non-Christians from the invocation opportunity. *Id.* at 597 (concurring).

Nor would the coercion test eliminate the "delicate and fact-sensitive" review inherent in Establishment Clause jurisprudence. *Lee*, 505 U.S. at 597. As Justice Scalia put it in *Lee*, the test is "boundlessly manipulable." *Id.* at 631-32 (Scalia, J., dissenting). The Legion states that under its test, a plaintiff must "demonstrate some form of coercion." Legion Br.22. It uses terms like "compels," "exploited to excessively proselytize," and "historically grounded form of coercion" to define its test. Legion Br.47, 53. At the same time, it concedes that "direct" coercion is not required. Br.22. *See Santa Fe*, 530 U.S. at 312. So what do "compel," "exploit," "proselytize," and "excessive" mean? Adopting a coercion-only test would not allow courts to avoid these questions, and "[d]ifferences of opinion are undoubtedly to be expected." *Nyquist*, 413 U.S. at 805-06 (Rehnquist, J., concurring and dissenting).

The Legion offers but one example, in a footnote at that, as to what would be prohibited as coercive: the "preferential funding of religious organizations." Legion Br.23-24 (citing *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)). Not only did *Amos* embrace and apply *Lemon*, but *Amos* did not even involve a religious display—making it clear that, under the Legion's interpretation of the "coercion" test, *no* display would be out of bounds.

3. The Cross fails the coercion test.

Even if the Court evaluates the Bladensburg Cross under the coercion test, the Cross remains unconstitutional. While the Legion (at 55) contends that "passive displays with religious imagery" "cannot constitute an establishment of religion except in extraordinary cases," the Bladensburg Cross is indeed extraordinary. Justice Kennedy's concurrence in *Allegheny* deemed a "large Latin cross" conspicuously displayed "year-round" atop city hall an "extreme" case and an "obvious" violation. 492 U.S. at 661 (concurring and dissenting).

The Bladensburg Cross is, if anything, even more "extreme" than Justice Kennedy's exemplar: at 40-feet, it is huge; it is displayed year-round; and it is nothing but conspicuous and prominent. In addition, unlike the display in *Van Orden*, which was "passive" because it was not used for "meditation" or "religious activity,"

545 U.S. at 701-02 (Breyer, J., concurring), and presumably even unlike Justice Kennedy's cross atop city hall, the Bladensburg Cross has been used as the centerpiece for annual Town-sponsored events that include Christian prayer. Pet.App.8a.

Furthermore, even the Legion agrees that a practice violates the coercion test if it coerces "financial support for religion." Legion Br.53. Here, the Commission has poured $117,000 of taxpayer money into the Cross's renovation and upkeep and has earmarked $100,000 for another substantial renovation project. "When the power, prestige and *financial support* of government is placed behind *a particular religious belief*, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431 (emphasis added).

In sum, adopting a single "coercion" or "history" test to govern every Establishment Clause case flouts this Court's "unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679. "It is always appealing to look for a single test, a Grand Unified Theory." *Grumet*, 512 U.S. at 718-19 (O'Connor, J., concurring). But "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Id.* at 720. Only the *Lemon* test, which, as discussed below, has withstood the test of time, fully accounts for all the relevant variables.

III. If the Court reaches the question, it should reaffirm the *Lemon* test and hold that the Bladensburg Cross runs afoul of the test.

A. The *Lemon* test derived from decades of precedent, effectuates the principles of the Establishment Clause, and has brought clarity and consistency to religious-display cases.

The Legion and its *amici*'s attack on *Lemon* is an attack on the entire history of Establishment Clause jurisprudence. *Lemon* was a carefully considered 8-1 opinion of then-Chief Justice Burger that distilled the entirety of the Court's Establishment Clause jurisprudence into a sensible framework. 403 U.S. at 612.

That distillation broke no new ground; rather, it was "a convenient, accurate distillation of this Court's efforts over the past [five] decades to evaluate a wide range of governmental action." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). "[T]he now well-defined three-part test that has emerged from [this Court's] decisions is a product of considerations derived from the *full sweep* of the Establishment Clause cases." *Nyquist*, 413 U.S. at 772-73 (emphasis added).

The test echoed what had been subscribed to by eight Justices eight years earlier in *Schempp*: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. at 222. These considerations had earlier

been recognized in *Torcaso*, 367 U.S. 488, in *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961), and in *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *id.* at 466 (Harlan, J., concurring) ("If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state."). And they were reaffirmed in *Gillette v. United States*, 401 U.S. 437, 450 (1971).

Indeed, since its adoption in 1971, the Court has adhered to the *Lemon* test in nearly every case, eschewing it only in cases that could be decided upon uncontested Establishment Clause precepts (as in *Lee*, *Larson*, and *Grumet*), the *sui generis* legislative prayer context (*Marsh* and *Town of Greece*), and where the Establishment Clause was raised as a defense (as in *Rosenberger* and *Pinette*).

More importantly, despite eschewing *Lemon* in rare instances, this Court has consistently applied *Lemon* in religious-display cases. *See, e.g.*, *McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53; *Lynch*, 465 U.S. at 683. Even in *Van Orden*, Justice Breyer stated that *Lemon* remained "useful" even in dual-significance cases and eventually applied all three of *Lemon*'s prongs. 545 U.S. at 700, 703-04 (Breyer, J., concurring).

And *Lemon* has yielded consistent results in such cases. Prominent religious displays that consisted of

solitary religious items, dominated their surroundings, or were motivated by religious purposes, have been deemed impermissible. *McCreary*, 545 U.S. at 881; *Allegheny*, 492 U.S. at 598-99 (crèche); *Stone*, 449 U.S. at 41-43. In contrast, dual-meaning items that were integrated into a larger display with a primarily secular purpose have withstood scrutiny. *Van Orden*, 545 U.S. at 691 n.11 (plurality); *id.* at 703-04 (Breyer, J., concurring); *Allegheny*, 492 U.S. at 616-17 (menorah); *Lynch*, 465 U.S. at 671, 681. The Circuits have had little trouble applying these rules, especially in *sectarian* display cases. Br. in Opp.15-18 (17-1717).[17]

Lemon's prongs are also "'precisely tailored to the Establishment Clause's purpose.'" *Edwards*, 482 U.S. at 587 (citation omitted). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary*, 545 U.S. at 860. The effect prong captures the essential command of the Establishment Clause that the government cannot "aid one religion, aid all religions, or *prefer one religion over* another." *Everson*, 330 U.S. at 15-16 (emphasis added). The final *Lemon* prong harkens back to the final example in *Everson* (*id.* at 16), which captures the Madisonian concern that secular and religious authorities

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[17] Rather than abandon *Lemon* wholesale, the effect-prong reasonable observer could readily be replaced with principled factors such as those set forth in I.C.

must not interfere with each other's respective spheres of choice and influence, *supra*.

"At a time when we see around the world the violent consequences of the assumption of religious authority by government," the Court must ask, "[w]hy would we trade a system that has served us so well for one that has served others so poorly?" *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring).

B. The Cross is unconstitutional under *Lemon*.

The Bladensburg Cross fails the effect prong of *Lemon* for the reasons set forth in Section I.C. and in the Fourth Circuit's decision. Pet.App.19a-31a. The Cross aggrandizes the hallmark symbol of Christianity; the symbol is not embraced by non-Christians as their symbol of sacrifice and is, indeed, offensive to some of them; the fact that the Cross is a war memorial exacerbates the Cross's unconstitutional effect because it discriminates against patriotic soldiers who are not Christian; the Cross is both permanently and prominently displayed; and the government has poured $117,000 into its restoration and maintenance, and is promising to spend at least $100,000 more on it. *Id.*

The magnitude of the government's funding also gives rise to entanglement problems, which are exacerbated by the Town and Commission's joining in religious activities held with the Cross as the backdrop. In *Lynch*, this Court indicated that government

involvement with a religious display amounts to excessive entanglement where there is "evidence of contact with church authorities," or where "expenditures for maintenance of the [display]" are more than *de minimis*. 465 U.S. at 684. The government's expenditures and involvement with this Cross—including frequent contact with Christian church authorities (and only Christian authorities) to deliver prayers at its events held at its Cross—dwarf the government involvement presented in *Lynch*.

IV. Upholding the Fourth Circuit's decision will not have the calamitous consequences Petitioners and their *amici* forecast.

A. Declaring the Bladensburg Cross unconstitutional would not doom other war memorials.

1. Petitioners overexaggerate the ubiquity of freestanding Latin cross memorials.

Petitioners and their *amici* claim that affirming the decision below will doom "countless" and at least "hundreds" of similar war memorials around the country. Comm'n Br.2, 22; Legion Br.11-12; West Virginia Amicus Br.6. In fact, "this war memorial—with its imposing Cross—stands as an outlier." *Trunk*, 629 F.3d at 1101. *See* J.A.84, 98, 165.[18]

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[18] Indeed, the smaller cross in Towson (Legion Br.5) is noted as a "rare example." C.A.App.2660.

"Thousands of war memorials have been dedicated since the end of the American Revolution, but most do not use any religious iconography," J.A.84, and "[e]ven fewer memorials are free standing sculptural renderings of the Latin Cross." J.A.79. "When the Cross has been used, it is seldom a dominant feature of the memorial." J.A.84. And when "free standing Latin Crosses have been built as war memorials they have generally been located in cemeteries." J.A.86. In the few examples where standalone crosses are built outside of national cemeteries, they usually serve as a "distinctive ethnic" marker. J.A.88. The Irish Brigade Monument (a Celtic cross), for instance, is but one of hundreds of monuments in Gettysburg and represents a brigade of Irish immigrants, bearing both the seal of Ireland and an Irish bloodhound. J.A.88, 98, 1122.

The "hundreds of other monuments built in the aftermath of World War I" that the Commission mentions on page 2, refers to its later statement on page 9 that the "*United Kingdom, Canada, and Australia* collectively built hundreds of 'Crosses of Sacrifice.'" (emphasis added).

The Commission later states that "by one estimate" there are "at least 40 World War I monuments . . . in the United States that bear the shape of a cross." Comm'n Br.8 (citing J.A.1130). As the source indicates, however, that number was taken from a search on the Smithsonian database for outdoor World War I sculptures that mentioned "cross." J.A.1130. A recent search shows that of the approximately 1,000 outdoor World War I sculptures tracked by the Smithsonian, only 19

incorporate some form of a cross.[19] And only a few incorporate the *Latin* cross, as opposed to the Red Cross, Celtic Cross, or Distinguished Flying Cross (i.e., the World War Cenotaph in Connecticut). And even fewer—three—consist of a *standalone* Christian cross: the "Peace Cross" at issue here; the "Victory Cross," a private Celtic cross in Baltimore that sits on the grounds of an Episcopal Cathedral (J.A.1457); and the "French Cross," another Celtic cross that sits in the Cyprus Hill National Cemetery in Brooklyn, New York (J.A.86-87).[20]

In the others (some of which are on private land), the cross is a non-dominant *integrated* component of a larger display. J.A.79, 1130. For instance, the "Polar Bear Memorial" features a large polar bear sheltering a helmet in which a small cross can be seen.[21] The "Volusia County Memorial To World War Heroes" consists of a large eagle standing on a cross-shaped gravemarker.[22]

Petitioners also refer to "114 Civil War monuments." Legion Br.39; Comm'n Br.46. But there are at

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[19] *Compare* Smithsonian Institute, *World War I, (sculpture) (outdoor sculpture)*, https://s.si.edu/2Fq7jNW, [https://perma.cc/8CYT-7WWU] (973 results), *with World War I, (sculpture) (outdoor sculpture) (cross)*, https://s.si.edu/2sjmqB1 (19 results).

[20] *Id.*

[21] Smithsonian Institute, *Polar Bear Memorial (sculpture)*, https://s.si.edu/2UJY7Js (accessed Jan. 15, 2019).

[22] Smithsonian Institute, *Volusia County Memorial To World War Heroes, (sculpture)*, https://s.si.edu/2SMoEEz (accessed Jan. 15, 2019).

least "3,500" Civil War monuments and only "114 include some kind of cross," and when the cross is used, it is *subordinated* to secular symbols. *Trunk*, 629 F.3d at 1113. J.A.97, 1120-21. Here, of course, the monument doesn't just *use* a Cross; it *is* a Cross.

2. The Bladensburg Cross is materially distinguishable from crosses in cemeteries and other multi-faith complexes.

Petitioners put much of their emphasis on the two cross memorials in Arlington Cemetery. Comm'n Br.7, 22; Legion Br.5, 55. But context matters. "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (footnote omitted).

While it is totally "natural" to encounter "religious imagery" in a cemetery (Legion Br.56), it is hardly natural to encounter a four-story concrete Christian cross at a Town's entrance in the middle of its busiest intersection. Like a billboard, the Cross advertises Bladensburg as a Town that "views being American and Christian as one in the same, or both." Pet.App.31a. *See* J.A.868 (Bladensburg Councilwoman boasting that the Cross "has always denoted Bladensburg").

Whereas one must take the initiative to visit Arlington or a museum, one cannot avoid the Bladensburg Cross due to its "[i]mposing size and its location." J.A.61, 1013. *See* J.A.698 (a local Jewish resident finding it "impossible to ignore"); C.A.App.530 (plaintiff Lowe); C.A.App.457 (plaintiff Edwords). At Arlington, "[t]he entire area [is] devoted to burials [and is] as sacred as a temple or a church." J.A.1239. It is designed for citizens to come pay their respects. Not so here. There is "no public access" and attempting to access the property is dangerous. J.A.70, 279, 460, 1348.

Additionally, the Arlington crosses stand "alongside a large number of other monuments" and neither "is a prominent or predominant feature of the cemetery." *Trunk*, 629 F.3d at 1114-15, 1124. Rather, they are amongst over 30 major monuments and over 140 memorials of varying sizes,[23] many of which are privately-sponsored.[24] The Argonne Cross is 13-feet-tall, nestled in one corner of the 624-acre cemetery, and serves as the burial site for the remains of 2,100 servicemen in Section 18.[25] The Canadian Cross of Sacrifice—a gift from the Canadian government to

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[23] ANC Explorer, *Monuments*, https://bit.ly/2FBM7Fw (accessed Jan. 15, 2019).

[24] Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 604, 126 Stat. 1165 (2012). *E.g.*, Nikki Wentling, *'It's a brotherhood': Veterans who fought for Vietnam helicopter monument at Arlington see it unveiled*, Stars and Stripes, https://perma.cc/FG9Y-83MZ (accessed Jan. 15, 2019).

[25] Arlington National Cemetery, *Argonne Cross (WWI)* (Oct. 7, 2015), https://perma.cc/K4RY-QFCU.

commemorate those who died serving *Canadian* Armed Forces (J.A.165, 951-52)—is dwarfed by the adjacent Tomb of the Unknown Soldier and Memorial Amphitheater.[26]

Moreover, a visitor to Arlington encounters not just crosses but "everything from a Bahai nine-pointed star to a Wiccan pentacle." *Id.* at 1113. *Cf. Skoros v. City of New York*, 437 F.3d 1, 25 (2d Cir. 2006) ("[W]hen menorahs [and] stars and crescents are displayed [with numerous other religious and nonreligious holiday symbols], their religious significance is appropriately neutralized."); *ACLU v. Schundler*, 168 F.3d 92, 95 (3d Cir. 1999) (Alito, J.) (display "contained not only a crèche, a menorah, and Christmas tree, but also . . . Kwanzaa symbols").

"Contrast that with the Cross here. There are no other religious symbols present . . . . Christianity is singularly—and overwhelmingly—represented." Pet.App.29a. The Circuits have thus had little trouble distinguishing freestanding cross monuments imposing over highways from crosses in cemeteries. *Trunk*, 629 F.3d at 1114, 1124; *Duncan*, 616 F.3d at 1161; Pet.App.28a-29a.

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[26] Arlington National Cemetery, *Brochure*, https://perma.cc/E75P-HJAA (accessed Jan. 15, 2019).

B. Affirming the Fourth Circuit's ruling would not portend the "mutilation" of the Cross; nor would reversing save the Cross from its own demise.

The Fourth Circuit remanded "to explore alternative arrangements that would not offend the Constitution." Pet.App.31a-32a. "The proper remedy, like the determination of the violation itself, is necessarily context specific, and even if it involves moving the cross, it need not involve the 'demolition' or 'destruction' of the cross." *Buono*, 559 U.S. at 755 n.11 (Stevens, J., dissenting).

The Commission itself has contemplated the Cross's transfer "to a non-profit organization." C.A.App.1718. Such a move would not be unprecedented. The Williamsport, Maryland WWI Monument—a 16-foot-tall bronze and granite doughboy—was originally installed on a traffic island in 1926. J.A.98-101.[27] At the behest of the State Roads Commission, it was moved to a park in 1953, and then to the Williamsport Legion post in 1977.[28] A 14-foot-tall bronze and granite World War I memorial in Baltimore had been relocated several times as well. J.A.105-06. The Commission has even moved entire houses to make way for highways. C.A.App.621-22.

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[27] Smithsonian Institution Research Information System, *World War I Monument (sculpture)*, https://s.si.edu/2M4jjG7 (accessed Jan. 16, 2019).

[28] *Id.*

Removing the Cross from its current location would not only protect the public from a crumbling safety hazard (Maryland Amicus Br.3)—or as the Commission's own expert called it, "public eyesore" (J.A.1429)—but would also protect the Cross from the "commercial traffic and air-borne pollutants" that are causing its demise. J.A.737.

Modifying the monument into an obelisk or some other form—one that neither co-opts the principal symbol of Christianity for war purposes nor categorically excludes non-Christian veterans—is another possible solution. *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). In 2013, the Commission itself proposed demolishing the Cross and starting "from scratch." J.A.847. "As a matter of fact, the Peace Cross is coming down now." J.A.1074.

CONCLUSION

Whatever else the Establishment Clause means, it must mean that the government cannot single out veterans of only one faith for commemoration while leaving the rest to be forgotten. "In our constitutional tradition, all citizens are equally American, no matter what God they worship or if they worship no god at all." *Newdow*, 603 F.3d at 1016 (Kavanaugh, J.,

concurring). The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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